IN THE SUPREME COURT

OF THE UNITED STATES

No. 75-577
OCTOBER TERM 1975

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Petitioner,

v.

STATE OF OREGON ex rel State Land Board,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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IN THE SUPREME COURT

OF THE UNITED STATES

No. _____
OCTOBER TERM 1975

STATE OF OREGON, Acting by and through the State Land Board,

Plaintiff-Appellant,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Defendant-Respondent and Cross-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Corvallis Sand and Gravel Company, an Oregon corporation, prays that a writ of certiorari issue out of this Court to review the judgment of the Supreme Court of the State of Oregon entered in the above-entitled case.

OPINION BELOW

The opinion of the Supreme Court of the State of Oregon has not yet been officially reported. It has been unofficially reported 536 P2d 517. The full text of the opinion

appears in the Appendix (A. 69-74). The opinion of the Oregon Court of Appeals has not yet been officially reported. It has been unofficially reported 526 P2d 469. The full text of the opinion appears in the Appendix (A. 23-68). The lower court judgment also appears in the Appendix. (A. 17-22).

JURISDICTION

The judgment of the Supreme Court of the State of Oregon sought to be reviewed is dated and was entered of record on June 12, 1975.

Within the time allowed by law, Corvallis Sand and Gravel Company filed a Petition for Rehearing which raised the questions presented for review herein. The Petition for Rehearing was denied, without opinion, under date of July 17, 1975. (A. 75-76).

QUESTIONS PRESENTED FOR REVIEW

1. Does plaintiff, State of Oregon, have sufficient ownership to maintain statutory ejectment to recover possession of the bed of a navigable fresh water stream where its claim of ownership is based on sovereignty rather than grant and where there is no allegation pleaded and no proof that the public rights of navigation, fishery and related uses are being impaired or interfered with by defendant Corvallis Sand and Gravel Company?

2. Does plaintiff, State of Oregon, have sufficient ownership to maintain statutory ejectment to recover damages for the removal of sand and gravel from the bed of a navigable fresh water stream where its claim of ownership is based on sovereignty rather than grant and where there is no pleaded allegation or proof that the public rights of navigation, fishery and related uses are being impaired or interfered with by the defendant Corvallis Sand and Gravel Company?

STATUTORY PROVISIONS INVOLVED

The following federal and state statutes relevant to this petition are reprinted in the Appendix: 28 U.S.C. 1257(3) (A. 14); 28 U.S.C. 2101(c) (A. 14); [1]ORS 105.005 and ORS 105.010 (A. 14-15).

STATEMENT OF THE CASE

A. Statement of facts.

In June of 1965 the State of Oregon filed a statutory ejectment proceeding against Corvallis Sand and Gravel Company to recover possession of a portion of the bed of the Willamette river. ORS 105.005 and ORS 105.010 (A. 14-15). The Willamette is a fresh water navigable stream above tidewater. The complaint alleged that the State of Oregon was the owner of the river

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[1]ORS refers to Oregon Revised Statutes.

bed by virtue of its sovereignty. There was no allegation that Corvallis Sand and Gravel Company was in any way interfering with the public right of navigation, fishery, or the like. The State of Oregon introduced no evidence to establish any such interference. The only use made of the river by Corvallis Sand and Gravel Company was to remove sand and gravel materials. Corvallis Sand and Gravel Company placed into evidence permits issued by the Corps of Army Engineers (which has jurisdiction over the protection of navigation) authorizing Corvallis Sand and Gravel Company to remove sand and gravel material from the bed of the Willamette river during the time in issue. The State of Oregon also sought damages from Corvallis Sand and Gravel Company on a cubic yard basis for the removal of sand and gravel materials from the river's bed.

Corvallis Sand and Gravel Company demurred to the complaint on the ground the same failed to state facts sufficient to constitute a cause of action. The demurrer was overruled.

The trial court entered a judgment in favor of the State of Oregon against Corvallis Sand and Gravel Company awarding the State of Oregon ownership of portions of the disputed property and also awarding the State of Oregon damages for the removal of sand and gravel materials (A. 17-22).

Both parties appealed the decision to

the Court of Appeals of the State of Oregon. While these appeals were pending, and on December 17, 1973, (after Corvallis Sand and Gravel Company had filed its initial brief on cross-appeal) the United States Supreme Court decided the case of Bonelli Cattle Company et al v. State of Arizona et al, 414 U.S. 313, 38 L.Ed.2d 526, 94 S.Ct. 517 (1973).

The Bonelli decision, supra, was the first to declare that the ownerhip of the beds of navigable fresh water streams is a question of federal law and was also the first to declare that the interest of the state in the riverbed is "as a bed".

In its reply brief in the Court of Appeals of the State of Oregon Corvallis Sand and Gravel Company assigned the following error:

> "The court erred in overruling defendant's demurrer to plaintiff's first amended complaint on the ground the complaint failed to state facts sufficient to constitute a cause of action."

In support of this assignment of error Corvallis Sand and Gravel Company cited Bonelli, supra.

The Court of Appeals of the State of Oregon did not expressly pass upon this assignment of error (A. 23-68) but overruled the assignment by affirming the

judgment of the trial court, with modifications, which had awarded to the plaintiff judgment for possession of substantial portions of the bed of the Willamette river together with damages for the removal of sand and gravel materials therefrom.

Corvallis Sand and Gravel Company filed a Petition for Review of the decision of the Court of Appeals of the State of Oregon in the Supreme Court of the State of Oregon and assigned as error the following:

> "The court erred in ruling that plaintiff had a cause of action despite its failure to plead interference by the defendant with navigation, fishery and related public uses of the disputed property and despite the absence of any evidence to prove such interference."

In support of this assignment of error Corvallis Sand and Gravel Company cited Bonelli, supra, and State v. Gill, 259 Ala 177, 181, 66 S2d 141, 145 (1953) for the proposition the state's title is to the "riverbed as a bed." cited in Bonelli, 38 L.Ed. 526, 536.

The Supreme Court of the State of Oregon affirmed the decision of the Court of Appeals (A. 69-74).

Corvallis Sand and Gravel Company timely filed with the Supreme Court of the State of Oregon a Petition for Rehearing on the two issues herein raised.

The Supreme Court of the State of Oregon denied the petition (A. 75-76).

B. Basis for federal jurisdiction.

Jurisdiction in this court is based upon 28 U.S.C. 1257(3); 28 U.S.C. 2101(c); Rule 19(1)(a) of the Supreme Court of the United States; 32 Am.Jur.2d 722, Federal Practice and Procedure § 253; Williams v. Georgia, 349 U.S. 375, 99 L.Ed. 1161, 75 S.Ct. 814; Missouri Pacific Railroad Company v. Elmore & Stahl, 377 U.S. 134, 12 L.Ed.2d 194, 85 S.Ct. 1142, United States v. Union Central Life Insurance Company, 368 U.S. 291, 7 L. Ed.2d 294, 82 S.Ct. 349; and Bonelli Cattle Company et al v. State of Arizona et al, 414 U.S. 313, 38 L.Ed.2d 526, 94 S.Ct. 517 (1973).

ARGUMENT

Reasons for Allowing the Writ

The opinion of the Supreme Court of the State of Oregon, by ignoring the limitation that the state's interest in the bed of a navigable stream is "as a bed" and not in the individual grains of sand, rocks, or the like, is contrary to the decision of this Court in Bonelli Cattle Company v. Arizona, supra.

The issues here presented, whether or not a state can maintain ejectment (or any similar proceeding such as a suit to quiet title), is of national importance because of the practice of many states to charge

royalties for sand and gravel materials removed from the beds of navigable streams within their respective jurisdictions even though that removal is conducted under permits issued by the Corps of Army Engineers and despite the absence of any allegation or proof that the removal in any way interferes with the public rights of navigation, fishery, recreational use, or like aspects.

The public catches fish in fresh water rivers, removes shell fish from the bed, collects valuable rocks and stones, takes sand, gravel, and the like, all without paying royalty or other charges to the state. However, when parties commercially remove sand and gravel, many states, including Oregon, take the position that they are entitled to maintain ejectment (or a suit to quiet title) and are entitled to damages even though the state's public trust to protect against interference with navigation, fishery, and similar purposes, has in no way been violated.

A decision in this case would decide the extent of the state's interest in the bed of a navigable fresh water stream and its right to maintain an action or suit for recovery of the bed and the right of a state to charge for the removal of sand, gravel, silt, and other materials. The issue involves millions of dollars annually.

In ejectment the plaintiff can recover only on the strength of its own title and not on the weakness of its adversary's.

25 Am.Jur.2d 553, Ejectment, § 19.

The question of the extent of the State of Oregon's interest in the bed of a navigable stream is a federal question to be determined by federal law. Bonelli Cattle Company v. Arizona, 414 U.S. 313, 38 L.Ed.2d 529, 534-36, 94 S.Ct. 517.

The only interest of the State of Oregon in the bed of the Willamette river is in the nature of a navigational servitude for the protection of the public right of navigation, fishery and related uses. Bonelli Cattle Company v. Arizona, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 529, 536-37.

The Oregon Court of Appeals recognized the rule in the following language:

> "There are several conclusions to be distilled from Bonelli and other cases dealing with navitable waterways. First and most important is that the state's right in the bed of the river is a limited right and relates to a navigational or related purpose." (A. 39).

The Oregon Court of Appeals also stated:

> "***while the extent of the state's interest should not be narrowly construed because it is denominated a navigational purpose, see Bonelli Cattle Co. v. Arizona, supra, n 15, the implication is clear that the other purposes must somehow be related to the navigational purpose." (A. 39).

Despite the above language the Oregon Court of Appeals declined to declare that the State of Oregon could not maintain the ejectment action or recover damages thereunder. The Supreme Court of the State of Oregon affirmed without comment. (A.

In Bonelli Cattle Company v. Arizona, supra, this Court held that the state's interest in the bed of a navigable stream is in the "riverbed as a bed" citing State v. Gill, 259 Ala 177, 181, 66 So.2d 141, 145 (1953). In Gill, supra, the Alabama court ruled that the state's title:

> "***is a title to the bed as a bed and not the individual grains of sand or lumps of mud that constitute the land making up the bed."

A state, such as Oregon, could properly maintain ejectment and claim damages if someone erected an impediment to navigation, such as a pier, a dam, a floating commercial enterprise or houseboat, or an oil drilling rig. However, when the use is one which does not interfere with the public rights, ejectment does not lie.

The State of Oregon at no time has pleaded, proved or claimed that Corvallis Sand and Gravel Company's removal operations in any way interfere or will interfere with the public interest in the bed of the stream.

Here Corvallis Sand and Gravel Company conducted its sand and gravel removal operations under permits granted by the Corps of Army Engineers. Under these permits it was required not to interfere with any public rights.

The law as to the ownership of the beds of tidal waters is uniform throughout the United States. 78 Am.Jur.2d 817, Waters, § 381. However, there is a great diversity of rulings as to the ownership of the beds of navigable fresh water streams. 78 Am.Jur. 2d 818, Waters, § 381. Some states hold that title is in the state. Some states hold that title is in the riparian owner. Some states hold that the riparian owner has title to low water while the state owns the bed between low water marks. 78 Am.Jur 2d 817, Waters, § 380; 78 Am.Jur.2d 818, Waters, § 381; 78 Am.Jur.2d 827, Waters, § 386.

There is no uniformity among the states as to the right of the state to dispose of the bed of navigable fresh water streams. 78 Am.Jur. 2d 844, Waters, § 401.

The confusion is best summarized as follows:

> "There has been much diversity of opinion and of positive laws in this country as to the ownership of land under waters, chiefly because, as hereinafter pointed out, each state in this country has been at liberty

> to determine over what submerged lands its sovereign prerogative of ownership should be exercised. In some states statutes have been passed modifying or abrogating the common-law rules and presumptions, while in others the courts have been permitted either to follow the common-law or civil-law rules relating to boundaries, or to establish their own doctrines."
>
> 78 Am.Jur.2d 814, Waters, §378

While it is established law that the individual states may dispose of the beds of navigable streams as each determines, the law is not settled as to what the state owns that it may dispose of. 78 Am.Jur.2d 844, Waters, § 401. This is a question of law. Bonelli Cattle Company v. Arizona, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 534, 536. The limits of ownership should be determined as a matter of federal law. Particularly, the right of a state to charge royalty for sand, gravel and other materials removed for commercial purposes should be spelled out.

Respectfully submitted,

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October 1975

APPENDIX A

28 U.S.C. § 1257: State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

* * * * *

28 U.S.C. § 2101: Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time

for applying for a writ of certiorari for a period not exceeding sixty days.

* * * * *

OREGON STATUTES

105.005 Right of action. Any person who has a legal estate in real property and a present right to the possession thereof, may recover possession of the property, with damages for withholding possession, by an action at law. The action shall be commenced against the person in the actual possession of the property at the time, or if the property is not in the actual possession of anyone, then against the person acting as the owner thereof.

105.010 Contents of complaint. The plaintiff in his complaint shall set forth:

(1) The nature of his estate in the property, whether it be in fee, for life, or for a term of years; including, when necessary, for whose life and the duration of the term.

(2) That he is entitled to the possession thereof.

(3) That the defendant wrongfully withholds the property from him to his damage for such sum as is therein claimed.

(4) A description of the property with such certainty as to enable the possession

thereof to be delivered if there is recovery.

APPENDIX B

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff	)
v.	) No. 21512
CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation, Defendant.	) Judgment

The above entitled matter having come on regularly for trial before the Court without a jury; plaintiff appearing through its attorneys Lee Johnson, Attorney General; by Peter S. Herman, Senior Counsel; and Philip J. Engelgau, Assistant Attorney General; defendant appearing through its president, John H. Gallagher, and through its attorneys, Robert Mix and George Mead; and the Court having considered the evidence of the parties and the arguments of counsel and having heretofore denied defendant's motion to reconsider the Court's previous rulings on the pleadings, and the Court having entered its Findings of Fact and Conclusions of Law and its Supplement thereto;

NOW, THEREFORE, the Court does hereby order and adjudge as follows:

I.

Defendant's motion asking the Court to reconsider its previous rulings on the pleadings is denied.

II.

PARCEL I

Plaintiff is the owner in fee simple of Parcel I, and is entitled to the immediate possession thereof; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel I is annexed hereto as Exhibit A and made a part hereof. (Description omitted.)

It is FURTHER ORDERED that plaintiff do have and recover from the defendant the sum of Seventy-one Thousand Seven Hundred Fifty Dollars ($71,750.00) as damages for the wrongful withholding of possession of Parcel I by the defendant from July 1, 1959 to the date of this Judgment.

III.

PARCELS 2A, 2B and 2C

Defendant is the owner in fee simple and entitled to the possession of Parcels 2A, 2B and 2C. A legal description of Parcels 2A, 2B and 2C is annexed hereto as Exhibits B, C and D, respectively, and made a part hereof. (Descriptions omitted.)

IV.

PARCEL 3

Plaintiff is the owner in fee simple of Parcel 3 and was entitled to the immediate possession of said parcel prior to July 1, 1963, the beginning date of the ten year lease between the parties covering said parcel. A legal description of said parcel is annexed hereto as Exhibit E and made a part hereof. (Description omitted.)

It is THEREFORE ORDERED that Plaintiff do have and recover from the defendant the sum of Seven Thousand Dollars ($7,000.00) as damages for the wrongful withholding of possession of said parcel by the defendant on and between July 1, 1959, and July 1, 1963.

V.

PARCEL 4

Plaintiff is the owner in fee simple of Parcel 4 and is entitled to the immediate possession of said parcel; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 4 is annexed hereto as Exhibit F and made a part hereof. (Description omitted.)

VI.

PARCEL 5

Plaintiff is the owner in fee simple of Parcel 5 and entitled to the immediate possession of Parcel 5; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 5 is annexed hereto as Exhibit G and made a part hereof. (Description omitted.)

It is FURTHER ORDERED that plaintiff do have and recover from the defendant, the sum of One Thousand One Hundred Twenty-five Dollars ($1,125.00) for the wrongful withholding of possession of said parcel by the defendant from July 1, 1959, to the date of this Judgment.

VII.

PARCEL 6

Plaintiff is the owner in fee simple of Parcel 6 and is entitled to the immediate possession of Parcel 6; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 6 is annexed hereto as Exhibit H and made a part hereof. (Description omitted.)

It is FURTHER ORDERED that plaintiff do have and recover from the defendant the sum of Two Thousand Six Hundred Twenty-five

Dollars ($2,625.00) for the wrongful withholding of possession of said parcel by the defendant from July 1, 1959, to the date of this Judgment.

VIII.

PARCEL 7

Plaintiff is the owner in fee simple of Parcel 7 and is entitled to the immediate possession of Parcel 7; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 7 is annexed hereto as Exhibit I and made a part hereof. (Description omitted.)

IX.

PARCEL 8

Defendant is the owner in fee simple and entitled to the possession of Parcel 8. A legal description of Parcel 8 is annexed hereto as Exhibit J and made a part hereof. (Description omitted.)

X.

PARCEL 9

Plaintiff is the owner in fee simple of Parcel 9 and is entitled to the immediate possession of Parcel 9; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant.

Defendant disclaims any interest in said parcel. A legal descripton of said parcel is annexed hereto as Exhibit K and made a part hereof. (Description omitted.)

Based on the above items of damages awarded plaintiff, it is ORDERED AND ADJUDGED that plaintiff do have and recover from the defendant the grand total of Eighty-two Thousand Five Hundred Dollars ($82,500.00) and its costs and disbursements herein incurred which are taxed in the sum of $371.50.

Dated this 28th day of July, 1972.

/s/ Richard Mengler
Circuit Judge

APPENDIX C

OREGON COURT OF APPEALS

SCHWAB, C. J.

This is an action at law in ejectment by the state pursuant to ORS 105.005, et seq, to recover possession of 11 described parcels of real property constituting portions of the bed of the Willamette River near Corvallis, and to recover damages for the reasonable value of the use of such parcels.

In 1958 the state filed a suit to quiet title to the land adjoining certain lots, which lots constitute a portion of the property in dispute now. In 1959, at trial, the case was dismissed without prejudice on motion for a voluntary nonsuit for failure of proof. In 1960 the state filed a suit for an accounting and an injunction covering the area in dispute in the case at bar. This case was voluntarily dismissed in 1961 by the state before it was at issue.

The first complaint in this action was filed by the state on June 7, 1965. In the complaint the portion of the riverbed in dispute was described as one parcel; the portions of the riverbed now constituting Parcels 2A, 2B and 2C were omitted. Instead of answering, the defendant filed a complaint in equity seeking to permanently enjoin the state's ejectment action. The state demurred to the complaint. The trial

court overruled the demurrer and a decree was entered in favor of Corvallis Sand and Gravel. On appeal the Supreme Court reversed. Corvallis Sand & Gravel v. Land Board, 250 Or 319, 439 P2d 575 (1968).

On December 23, 1969, the plaintiff filed its first amended complaint in ejectment in which it described the riverbed it sought to recover as 11 separate parcels and claimed damages for the use of each parcel. On July 7, 1970, the defendant filed its answer, denying the allegations of the complaint and raising 12 affirmative defenses. After procedural disputes leading to several amended answers, trial was held before the court without a jury, commencing October 11, 1971.

On May 25, 1972, the trial court issued a memorandum opinion awarding various parcels to each party and setting the amount of damages for the previous use by defendant of those parcels awarded to the state. Findings of fact and conclusions of law were entered on June 19, 1972. The court supplemented these findings on July 28, 1972, and judgment was entered the same day. The state appeals from that portion of the order which awards parcels described for the purposes of this litigation as 2A, 2B and 2C to the defendant, on the ground that it erred in finding that these parcels were formed by avulsion, and from the failure of the trial court to award interest on the money judgment from the date of taking by defendant to the date of the

judgment. The defendant cross-appeals from a variety of procedural rulings of the court, and the award of damages. For the reasons which follow, we affirm the trial court in all its rulings and its judgment with the exception of one relatively minor item of damages which we reverse.

I. Scope of Review

The scope of appellate review of the facts presented in this case was stated in Reif v. Botz, 241 Or 489, 496, 406 P2d 907 (1965):

> "*** On appeal in an action at law from findings of fact by a trial court sitting without a jury, this court cannot again place the evidence on the scales to see which side preponderates. We must confine ourselves to a search of the record for some evidence to support the findings. If we so find *** those findings cannot be disturbed."

See also, May v. Chicago Insurance Co., 260 Or 285, 490 P2d 150 (1971); State Highway Com. v. DeLong Corp., 9 Or App 550, 495 P2d 1215, Sup Ct review denied (1972), cert denied 411 US 965 (1973). The various findings of fact as to the formation of the various parcels and the amount of material removed from each parcel must be reviewed in light of this standard.

Much of the dispute in this case centers around the difference in testimony of

the expert witnesses of the parties. The credibility of the various witnesses and the weight to be given to their testimony is a matter for the trial court and will not be passed upon again by this court in a law action. Armbrust v. Travelers Ins. Co., 232 Or 617, 376 P2d 669 (1962).

Finally, we should note that when we state facts in this case, we are using the findings of fact of the trial court in all instances in which there is a conflict in the evidence.

II. Ownership of the Parcels in Dispute

This litigation involves ownership questions of certain parcels of the bed of the Willamette River[1] near Corvallis, Oregon, which parcels lie between ordinary high watermarks in an area bounded by the Mary's River on the north or downstream end, and the City of Corvallis Water Treatment Plant to the south or upstream end. For the purposes of this litigation, the state, in its complaint, divided this section of the river into 11 separate parcels[2].

[1]Neither party contests the fact that the Willamette River is navigable in the area involved in this litigation. For a comprehensive view of the geography of the disputed area, see map at 28.

[2]For a discussion of the propriety of splitting the disputed area into separate

On appeal, the ownership of eight of these parcels in in issue.

In order to put the ownership question into perspective, a brief overview of the facts is necessary. Prior to the latter part of 1909, the northerly portion of the Willamette River now shown on the attached map as the East Channel was the main channel of the river. Prior to 1909 the main channel veered to the east from a point just south of what is shown as Parcels 2A, 2B and 2C, went around the east side of Fischer Island and rejoined what is now the main channel at a point to the northwest of Parcels 2A, 2B and 2C. The area shown on the map as Parcels 2A, 2B and 2C, and described as the Fischer Cut area was a minor non-navigable channel which was submerged only seasonally. However, following a storm and flood in late 1909, the area known as Fischer Cut became the main channel of the river and the East Channel gradually became non-navigable.

With regard to Parcels 2A, 2B and 2C, the issue involves the consequences of this change of channels, with the state claiming ownership by virtue of its sovereignty over navigable waters and the application of an erosion principle. The defendant contends that the change was actually avulsive and that, in any event, the state's sovereignty does not extend to the bed of the river

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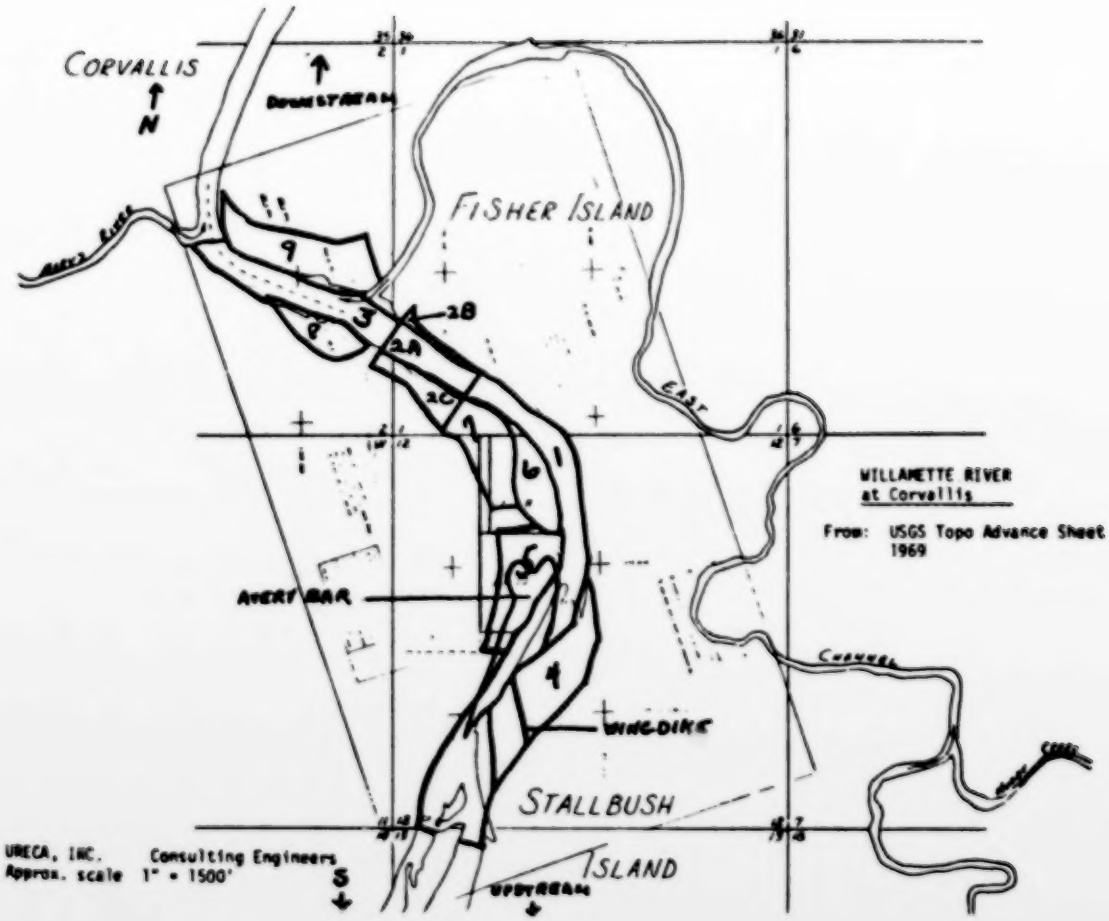
parcels and causes of action, see pp 63-65, infra.


CORVALLIS
N
DOWNSTREAM
FISHER ISLAND
EAST
AVERY BAR
WHEDIKE
STALLBUSH
ISLAND
UPSTREAM
WILLAMETTE RIVER
at Corvallis
From: USGS Topo Advance Sheet
1969
URECA, INC. Consulting Engineers
Approx. scale 1" = 1500'

included within these parcels.

With regard to other of the parcels the issue is who was holder of the original title. Finally, with some parcels, the issue arises because of formations of islands within the bed of the river, accretions thereto, removal of gravel deposits by the railroad, the construction of a wingdike in 1948 by the Army Corps of Engineers, and the general erosive and accretive processes of the river over the course of time.

The trial court awarded Parcels 2A, 2B and 2C to the defendant, and all the others to the state. Both parties raise a variety of factual and legal contentions in opposition to the findings and conclusions of the trial court. We will treat each parcel separately recognizing that, to some degree, the factual discussion as to each parcel will overlap somewhat the general discussion above.

A. Parcels 2A, 2B and 2C (Fischer Cut)

As indicated on the map, Parcel 2A is comprised of bottom land of the Willamette River between ordinary low water. Parcel 2B is riverbed between ordinary high and ordinary low water on the right bank of the river. Parcel 2C is riverbed between the ordinary high water and ordinary low water on the left bank of the river. The trial court made the following findings of fact

concerning the area within the Fischer Cut:

"1. Fischer Island from 1853 to 1909 was a peninsula-like formation around which the Willamette River coursed.

"2. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed known as Fischer Cut.

"3. In 1890 Fischer Cut would have had to be cleared of driftwood and willow growth before it could possibly accommodate the flow of the river. The Fischer Cut Channel was dry at low water, or below the five-foot stage, and carried water only at intermediate or high stages of the river.

"4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.

"5. Between 1890 and 1909 the high water overflow through Fischer Cut did not sufficiently clear Fischer Cut to allow for the full flow of the river and the river continued to flow around Fischer's Island during that period.

"6. As a result of a flood of November 25, 1909, the river suddenly and

with great force and violence converted Fischer Cut into the main channel of the river.

"7. The change was not gradual and imperceptible but was a rapid and violent change of course, avulsive in character and constituted an avulsion.

"8. Parcels 2A, 2B and 2C combined are included in the area known as Fischer Cut."

The state argues that ownership of the entire Fischer Cut area passed to the state by virtue of its sovereignty over navigable waters regardless of the manner of the formation of the cut. It also argues that regardless of the state's sovereignty, title to the Fischer Cut river bottom passed to the state because the Fischer Cut did not result from an avulsive change since an existing channel of the river was present prior to its enlargement. Defendant argues that the change was avulsive and that, in any event, Bonelli Cattle Co. v. Arizona, 414 US 313, 94 S Ct 517, 38 L Ed 2d 526 (1973), controls the ownership question.

1. The Sovereignty Issue

Under the equal-footing doctrine, as new states were admitted to the Union, they entered with the same rights, sovereignty and jurisdiction as the original states possessed within their respective borders. Accordingly, under the equal-footing

doctrine, title to the lands beneath navigable waters passed from the federal government to the state of Oregon upon its admission to the Union. Bonelli, 38 L Ed 2d at 534; An Act for the Admission of Oregon into the Union, ch 33, 11 Stat 383. Further, under the Submerged Lands Act, 43 USC § 1301(a)(1), the federal government quitclaimed all federal title to lands beneath navigable streams, as modified by accretion, erosion or reliction. By virtue of its sovereignty over navigable waters, the state contends that its title to the bed of the Willamette River follows the course of the river wherever it may move. Otherwise, the state argues, the bed will become a "checkerboard" of public and private ownership, seriously impairing the public use of the waters.

Questions of title to beds of navigable rivers must be evaluated in light of Bonelli Cattle Co. v. Arizona, supra. In Bonelli, the Supreme Court recognized the principle that it would be left to the states to determine what rights they would accord riparian owners in the beds of navigable streams which under federal law belong to the state. However, the question of how far the state's sovereign right extends under the equal-footing doctrine and under the Submerged Lands Act was found to involve a question of right asserted under federal law and, thus, federal common law would apply.

While Bonelli involved title to lands formerly under the main channel that had since become dry, the basic public policy discussion is equally applicable to the case where certain lands which were not under water are presently under water. The court in Bonelli first noted that, historically, title to the beds beneath navigable waters is held by the sovereign as a public trust for protection of navigation and related purposes. The court continued:

> " 'Such waters *** are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing ***.' Shively v. Bowlby *** [152 US 1, 11, 38 L Ed 331, 14 S Ct 548 (1894)]."
>
> "The State's title is to the 'riverbed as a bed' ***." Bonelli Cattle Co. v. Arizona, supra, 38 L Ed 2d at 536.

The fundamental purpose of the original grant involves navigational and related interests and the state can often protect these interests by holding a navigational servitude rather than by holding title to the bed.[3]

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[3]The court directs the reader to Note, Artificial Additions to Riparian Land:

While the extent of the state's interest should not be narrowly construed because it is denominated a navigational purpose, see, Bonelli Cattle Co. v. Arizona, supra, n 15, the implication is clear that the other purposes must somehow be related to the navigational purpose.

The only public purpose cited by the state deals with the question of public recreation in terms of wading, fishing, boating or swimming. However, such rights can be controlled under the navigational purpose doctrine, and title to the bed, asserted here only for the extraction of royalty payments, is not necessary. Certainty of title and other arguments raised by the state under its sovereignty argument do not relate to this legitimate state interest in control of navigation and fishing.

The first portion of Bonelli thus stands for several basic propositions. First, the extent of title to submerged lands and navigable waterways must be determined by federal common law. Second, the state's interest in the bed of navigable waters is basically that of the control of navigation, fishing and other related public goals. So

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Extending the Doctrine of Accretion, 14 Ariz L Rev 315 (1972), wherein the author speaks in terms of title being burdened with the state's "navigational easement." See, Bonelli Cattle Co. v. Arizona, 414 US 313, 94 S Ct 517, 38 L Ed 2d 526, 536, n 12 (1973).

the sovereignty principle alone will not support title of the state in these parcels. Thus we must turn to Bonelli and other federal cases to determine whether title to the bed passed to the state under the facts presented in the case at bar.

2. Nature of the Change in the River's Course

The court in Bonelli first noted that federal law recognizes the doctrine of accretion whereby the grantee of land bounded by a body of navigable water acquires a right to any gradual accretion formed along the shore. The court then discussed a number of interrelated policy reasons for the application of doctrine of accretion, which reasons refer to the risk a riparian owner runs that his land could be eroded by the action of the adjoining waterway. Under the court's analysis loss of land on a navigable waterway by a riparian owner to erosion would result in title to the bed passing to the state. See, Bonelli Cattle Co. v. Arizona, supra, 38 L Ed 2d 534, 536-37.

As defined in Bonelli, 38 L Ed 2d at 538, and other federal cases,[4] the doctrine of accretion requires the gradual, imperceptible accumulation of land on a navigable river bank. As found by the trial

[4] See, Philadelphia Co. v. Stimson, 223 US 605, 32 S Ct 340, 56 L Ed 570 (1912).

court and admitted by the state, there was no gradual addition or accumulation of land in this case. Rather, the river started to flow through a new channel. Since the accretion doctrine does not apply, the question is what this change to a new channel is denominated under federal common law and how such a change affects title to the riverbed.

One possibility is that this change was avulsive, as found by the trial court. As defined in Bonelli, 38 L Ed 2d at 539, an avulsion occurs where a stream suddenly and perceptibly abandons its old channel. Other federal cases state that such change must be visible in its progress. See, St. Louis v. Rutz, 138 US 226, 11 S Ct 337, 34 L Ed 941 (1891). Such an avulsive change does not affect title to the lands submerged by the water since this is not one of the risks run by a nonriparian landowner. Bonelli Cattle Co. v. Arizona, supra; Philadelphia Co. v. Stimson, 223 US 605, 32 S Ct 340, 56 L Ed 570 (1912); St. Louis v. Rutz, supra. While title does not change, the submerged lands do become subject to the public right of navigation, fishing and other related public purposes. See discussion, supra, at 34-35. The trial court found that the change in the Fischer Cut area was sudden and perceptible and, thus, constituted an avulsion. We find evidence in the record to support this conclusion.[5]

[5]The state relies heavily upon Purvine v. Hathaway, 238 Or 60, 393 P2d 181 (1964),

But even if the doctrine of avulsion does not adequately fit the facts in the case at bar, there is a middle course between the avulsion and accretion doctrines which perhaps more adequately reflects the facts presented. This is the so-called exception to the accretion rule announced in Commissioners v. United States, 270 F 110, 113-14 (8th Cir 1920):

> "*** [The accretion rule] is applicable to and governs cases where the boundary line, the thread of the stream, by the slow and gradual processes of erosion and accretion creeps across the intervening space between its old and its new location. To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then

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to support its position that this change was not avulsive in nature. First, it should be noted that federal common law controls ownership questions under Bonelli and, thus, state cases are of limited applicability. Second, Purvine did not involve the question of the state's ownership of the riverbed but rather involved boundary questions. Finally, the court found that an avulsive change had not been proved on the facts and that, for policy reasons, the court did not wish to apply the avulsion theory because of the effect that theory could have on boundary questions in the future.

> filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream ***."

While the court treated this as a form of accretion, the result is the same as avulsion in that the boundary line was found not moved to the new main channel but rather remained in the old main channel. In fact, at least one court claims that the rule in Commissioners was a rule of avulsion. See, Durfee v. Keiffer, 168 Neb 272, 95 NW2d 618 (1959). The rule of Commissioners was apparently recognized in Kansas v. Missouri, 322 US 213, 64 S Ct 975, 88 L Ed 1234 (1944).

Since the rule of Commissioners yields the same outcome as the avulsive theory,

the same result would apply as to the title of the newly submerged lands, namely, that it remains in the former owner and does not pass to the state. The government will hold the paramount navigational servitude, but will not become the owner of the submerged lands.

3. Conclusions

There are several conclusions we distill from Bonelli and other cases dealing with navigable waterways. First and most important is that the state's right in the bed of the river is a limited right and relates to a navigational or related purpose. Lands granted to the state of Oregon upon its admission in 1859 which were under water and are still under water belong to the state of Oregon at this time. While the grant of the bed in 1859 is not absolutely necessary for the paramount public purpose of control of navigation, it was, perhaps, the way the Congress felt the question of title to riverbeds should be determined. It can also be determined from Bonelli that where a bed of a river shifts by a slow process of erosion or accretion, title of the state to the bed of the river follows the change. However, where there is an avulsive change or a change that, under Commissioners, is treated like an avulsive change, the state does not obtain title to land under the water as it presently flows. The state's interest in navigation and other related purposes does not extend to a need for ownership of the riverbed.

Adequate evidence was introduced to support either the theory of avulsion as found by the trial court or a situation similar to that in Commissioners. But under either theory, the outcome is the same - the ownership of the land under the river does not change. The ownership of the overflowed lands in Parcels 2A, 2B and 2C remains with the owner of those lands before the changes of 1909, subject only to the paramount navigational servitude held by the state. This portion of the judgment of the trial court is affirmed.

B. Parcel No. 1

Parcel No. 1 lies between the present lines of ordinary low water with its upstream limits delineated by a line at right angles to the river and opposite the City of Corvallis Water Treatment Plant, and its downstream limits coinciding with the upstream limits of Parcel 2A. The trial court ruled that Parcel 1 belonged to the state. There are three separate issues involved in the ownership question of Parcel No. 1: (1) the length of the Fischer Cut; (2) the ownership of an area denominated the Avery Bar; and (3) the effect of the U.S. Army Corp of Engineers' wingdike. These will be treated separately.

1. Length of the Fischer Cut

The defendant contends that the change of 1909, which it terms an avulsion, extended a distance of 3200 feet upstream from

the downstream ends of Parcels 2A, 2B and 2C, and, therefore, included a portion of Parcel 1. The trial court ruled that the Fischer Cut did not extend upstream above Parcels 2A, 2B and 2C. However, the court did find that a small portion of Parcel 3 was included within the limits of Parcels 2A, 2B and 2C. This makes the cut area approximately 1600 feet in length. There is ample evidence both in the maps and in testimony of the state's expert witness to support this finding. The cut did not extend into Parcel 1.

2. The Avery Bar Issue

The Avery Bar area extends from Parcel 5 through Parcel 1. The defendant contends that when the Avery Bar was removed for gravel purposes by the railroad in the early twentieth century, the river moved back in over the excavated land. It argues that Avery Bar arose as an accretion from Parcels 5 and 6 which the defendant also contends it owns and, as such, when it was covered by water, it still belonged to the defendant. The trial court made the following finding of fact:

" *****

"3. Prior to 1913, a large portion of Parcel 1 consisted of a formation known as Avery Bar.

"4. That portion of the bed of the Willamette River occupied by Avery Bar

was not a part of Fischer Cut, discussed under Parcels 2A, 2B and 2C.

"5. Prior to 1913, Avery Bar originated as an island on the bed of the river below the lines of ordinary low water.

"6. Subsequently and by accretion, prior to 1913, the island joined the uplands on the left bank at the ordinary low water mark in front of government lots 9 and 10 [Parcel 5].

"7. Thereafter, a point bar developed on top of the joinder.

"8. Thereafter, the railroad in 1913 removed most of the bar by dredging large quantities of rock and gravel.

"9. The state owned from ordinary high water mark to ordinary low water mark in front of government lots 9 and 10 [ownership of these lots discussed infra at 22-25.

"10. The point bar, known as Avery Bar, accreted to land owned by the state, that is, to the island which had originated in the bed of the river below ordinary low water.

"11. Thereafter, it is not material whether the accreted mass became covered with water from whatsoever cause, be it the wingdike constructed

by the Corps of Engineers in 1948, discussed under Parcel 4, or the dredging of Avery Bar by the railroad in 1913-1914."

It is established that if an island or dry land forms upon that part of the bed of a river which is owned in fee by the riparian proprietor, the same is a property of said riparian proprietor. St. Louis v. Rutz, supra, 138 US at 245. Further, the owner of an island is entitled to land added thereto by accretion. 65 CJS 261, Navigable Waters § 82(6).

Once again the facts settle into separate positions taken by the parties' expert witnesses. The state's witness claimed that the Avery Bar started as an island and that the deposits accreted to the island. The defendant's witness, on the other hand, contended that Avery Bar was an accretion to the uplands, namely Parcels 5 and 6, which the defendant claims it owns. There is evidence to support the trial court's finding and it is affirmed.

3. 1948 Corps of Engineers' Wingdike Formation

Much of this argument overlaps the Avery Bar argument, supra. The defendant contends that a wingdike constructed by the Corps of Engineers in 1948 further covered part of Parcel 1 made up of the Avery Bar area. It again argues that Avery Bar was an accretion to the uplands which the defendant owned and

that the avulsive change caused by the wingdike allowed ownership of the land of Avery Bar to continue in defendant. The trial court's finding of fact in the matter is set out in full, supra. There is evidence to support these findings.

C. Parcel 3

Parcel 3 lies in the bed of the river between ordinary low watermarks and runs from the upstream end of Parcel 2A past the confluence with the East River to a point approximately equal to the confluence with Mary's River. On July 1, 1963, the state leased to the defendant for a term of ten years that portion of Parcel 3 beginning at the confluence with the East River and extending downstream for approximately 4,000 feet. The trial court split Parcel 3, awarding the downstream portion from the confluence with the East River to the state, and the upstream portion from the confluence of the East River to the defendant, finding that it was within the Fischer Cut. The state appeals from that portion of the decree awarding the area upstream of the East River to defendant. There is evidence supporting a finding that the portion upstream from the confluence of the East River was included within the Fischer Cut. Under Bonelli and related cases, title to that land remainded in the original owner.

D. Parcel 4

On appeal, defendant has abandoned all

claim to this parcel so it need not be discussed herein.

E. Parcel 5

Parcel 5 lies in the bed of the river between the lines of ordinary high and ordinary low along the left bank of the river. The trial court awarded this parcel to the state below the ordinary high watermark. The defendant argues:

1. That the northerly one-third of Parcel 5 is included in the avulsive change of Fischer Cut;

2. That a portion of Parcel 5 is included in the Avery Bar area; and

3. That the Corps wingdike of 1948 was an artificial change of channel which worked no change of title, and was an artificial avulsion.

The trial court made the following findings of fact:

> "1. Parcel 5 lies in the bed of the river between the lines of ordinary high and ordinary low along the left bank of the river.
>
> "2. Inasmuch as Parcel 5 fronts government lots 9 and 10, defendant's predecessors in title acquired no right therein under laws of 1874, page 76.

The question of the length of the Fischer Cut and the formation of the Avery Bar has already been discussed above. There is evidence to support the trial court's ruling that Parcel 5 was not within the avulsive change and that the Avery Bar did not form as an accretion to Parcel 5.

There are still several portions of Parcel 5, however, that do not fall in either the Fischer Cut or Avery Bar category. The question to be resolved as to these areas involves a United States patent to certain lands and Acts of the Oregon legislature in 1874 and 1878. In 1874, the legislature granted the area on the Willamette River between low and high water to adjacent riparian owners. General Laws of Oregon 1874, p 76.

In 1875, defendant's predecessor in interest, one Norring, filed for a homestead on Government Lots 9, 10 and 12; Parcel 5 is the area between high and low water fronting Lots 9 and 10. On October 18, 1878, the Governor signed a law repealing the statutory grant of land between high and low water on the Willamette River. General Laws of Oregon 1878, § 34, p 54. The patent to Government Lots 9 and 10 was not issued to Norring by the United States government until April of 1882. The question thus presented is whether Norring was an "owner" within the contemplation of the Oregon statute when he settled on the property in 1875 and, if not, did the patent obtained in 1882 relate back to his original entry in 1875 rendering him an owner

within the contemplation of the statute.

In support of his contention that Norring was an "owner", defendant relies upon Faull v. Cooke, 19 Or 455, 26 P 662, 20 Am St R 836 (1890), in which the court determined what rights a homesteader acquired in land by virtue of his homestead settlement and subsequent compliance with the Act of Congress granting homesteads to actual settlers upon the public lands of the United States and the issuance to him of a patent therefor by the United States. In Faull the court found that a homestead patent related back to the date of settlement. However, the question here concerns not homestead rights but the granting of the state lands between high and low water to the owner of riparian lands bordering thereon. State v. McVey, 168 Or 336, 121 P2d 461, 123 P2d 181 (1942), speaks more nearly to the point. In McVey the court considered the question of ownership of a gravel bar between high and low water. The court first noted that General Laws of Oregon 1874, p 76, did not vest title in the bed between high and low water in the federal government. The court then construed the statute and tried to determine the intent of the legislature and the historical background of the legislation. The court first noted in McVey, 168 Or at 353-54:

> "***It was undoubtedly due to the fact that many riparian owners along the Willamette, Coos, Coquille and Umpqua

> rivers had treated the river beds between high and low water marks as private property and had sometimes improved such parts of the river beds by the erection of expensive structures, that the legislature amended the 1872 enactment so as to protect them and their investments by making a grant of the beds of those rivers above low water mark to the riparian owners ***.
>
> "The legislature was concerned with private ownership of property abutting upon tide lands and property adjacent to the beds of certain designated navigable rivers. It was not concerned with the United States as owner of any such lands. *** It may be noted *** that the act did not grant to a settler the right to purchase the title land until after he had received a patent from the federal government." (Emphasis supplied.)

Norring did not become an "owner" until after he had received the patent from the federal government. Since he did not receive the patent until after the date of the repeal of the Act authorizing him to obtain ownership of the land between high and low watermarks, he was not an "owner" within the terms of the statute.

The defendant's second argument is that the patent received by Norring in 1882 related back to his entry on March 15, 1875, when the statute granting ownership to the

low water level was in effect. Defendant again cites numerous cases involving homestead law in which the patent does relate back to the date of entry insofar as it cuts off a title of one who enters after the original entryman. As made clear in State v. McVey, supra, the disposition of these lands is controlled by state law, and the doctrine of relation back will not apply.

Defendant makes reference to ORS 105.070 in support of his relation back claim. That statute declares that in an action at law for the recovery of the possession of real property, if either party claims the property as a donee of the United States under the Donation Law, such party from the date of his settlement on the property is deemed to have a legal estate and fee in the property. This statute originated in 1862 in General Laws of Oregon, § 329, p 230 (Deady 1845-1864), well before the statutes in question here and the decision in State v. McVey, supra. Also, this refers to lands owned by the United States government and passed under the homestead acts. It does not control the later state legislative enactments dealing with the state's land between high and low water.

F. Parcel 6

Parcel 6 also lies in the left bank of the river and consists of land between ordinary high and ordinary low water. Defendant contends that Parcel 6 is in actuality Government Lot 11 of Section 12 which was

patented by the defendant's predecessor in title before the repeal of the 1874 statute. The state admits that the patent on Government Lot 11 was completed prior to the repeal of the laws of 1874, but contends that Government Lot 11 has eroded away completely and that Parcel 6 arose from an island in the river that joined by accretion to the uplands.

The trial court made the following findings of fact:

> "1. Parcel 6 lies in the bed of the river between the lines of ordinary high and ordinary low water along the left bank of the river.
>
> "2. Parcel 6 is not within the avulsive channel of Fischer Cut.
>
> "3. Defendant's predecessor in title acquired no right therein by virtue of Laws of 1874, p 76.
>
> "4. Parcel 6 formed in the bed of the river after 1878 and accreted to the uplands at the low water mark on the frontage of government lots 10, 11 and 12 of Section 12. The accreted formation cut off the submersible lands fronting what remained of Government lot 11."

Both parties agree that defendant's predecessor in title acquired rights in Government Lot 11 and the submersible lands

fronting it, so paragraph 3 of the findings of fact is incorrect. However, there was adequate evidence introduced to support the finding that Government Lot 11 eroded away and that Parcel 6 formed in the bed of the river and accreted to the uplands. So long as this parcel remains submersible, title will remain in the state. See, Bonelli Cattle Co. v. Arizona, supra.[6]

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[6]The court in Bonelli adopted the doctrine of re-emergence:

> "Under the doctrine of re-emergence, when identifiable riparian land, once lost by erosion, subsequently re-emerges as a result of perceptible change in the river course, title to the surfaced land revests in its former owner ***. The re-emergence doctrine has been accepted by a number of States ***. Because of the limited interest of the State in the former riverbed, we have held the doctrine of avulsion inapplicable to this suit between the State and a private riparian owner, who is seeking title to surfaced land identifiable as part of his original parcel. In that sense, we have embraced the re-emergence concept." (Emphasis supplied.) 38 L Ed 2d at 541, n 28.

In the case at bar, no evidence was introduced to show that any portion of Government Lot 11 was above ordinary high water. To the extent that a portion of Lot 11 is

G. Parcel 7

Parcel 7 is in an area between ordinary high and ordinary low water on the left side of the river. It consists of part of Govenment Lot 13, Section 12, and the Alexander Donation Land Claim. The defendant contends on appeal only that Parcel 7 was within the alleged avulsive change of 1909 occurring in the Fischer Cut area and, therefore, should belong to the defendant. The trial court found that it was not within the cut. There is evidence to support this finding.

III. Procedural Questions Relating to Damages

The defendant raises several assignments of error relating to the damages awarded by the court for those parcels given to the state. The defendant first contends that the state's failure to use an ad damnum clause in its pleading required the trial court to exclude all evidence on damages. This contention was decided adversely to defendant's position by Hollopeter v. Palm, 134 Or 546, 550, 291 P 380, 294 P 1056 (1930), appeal dismissed 284 US 572 (1931), wherein the court concluded that the entire omission of the ad damnum clause was

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now emerged or re-emerges in the future, title to that portion could return to the defendant. For possible limitations on this return of title, see, Annotation, 41 ALR 395 (1926). On the facts as presented we need not settle that question now.

immaterial where, as here, after a cause of action is set out there is a prayer for a specified amount.

Defendant also argues that the court erred in denying its motion to exclude evidence from the case on damages which occurred after the filing of the complaint in the original case in June of 1965. Damages in ejectment proceedings are provided for by ORS 105.030, which statute specifically permits the recovery of damages from the date of the commencement of the action to the giving of a verdict.

The defendant next contends that the court erred in denying its motion to exclude evidence relating to quantities of gravel dredged from the river. Defendant claims that since the state has pleaded as the measure of damages the reasonable value of the use of the premises for each year or, as admitted by defendant, rental value, it cannot introduce proof as to amount of gravel removed since that does not relate to rent. However, it is noted in Newell on Ejectment, ch XIX, § 3, 606-07 (1892):

> "Whatever would be rent, as between landlord and tenant, is mesne profits as between the parties in ejectment. But these profits frequently include matters which would hardly be termed rent as between landlord and tenant ***." (Emphasis supplied.)

Accord, Crane v. Oregon R. & N. Co., 66 Or

317, 328, 133 P 810 (1913). Mesne profits are defined as the rents and profits or the value of the use and occupation of the real property recovered in an action of ejectment for the period during which the property has been wrongfully withheld. Newell, supra, § 2.

There are numerous cases which find that royalty payments pursuant to a lease would constitute mesne profits or rent in an ejectment action. See, United States Steel Corporation v. United States, 270 F Supp 253, 259 (SD NY 1967), aff'd 445 F2d 520 (2d Cir 1971), cert denied 405 US 917 (1972); Moragne v. Doe, ex dem. Moragne et al., 143 Ala 459, 39 So 161, 111 Am St R 52 (1904); Barnard v. Jamison, 78 Cal App2d 136, 177 P2d 341 (1947).

Finally, under ORS 274.530, when the state leases its submersible and submerged lands in navigable streams, the lease is not payable in a lump sum but only on the basis of a price per cubic yard or ton for the material removed. Under the statute, "rent" would be the same as "royalties" and these would be determined on the basis of the total amount of material removed from the river.

In sum, where, as conceded by defendant, the state pleaded lost rent as its damages in an ejectment action, it would be able to show the value of that lost rent through the use of royalties based upon the total amount of material removed from the river.

IV. Amount of Damages

Defendant contends that the court erred in allowing any damages to the state because such damages were speculative and also that the court erred in awarding any damages to the state for the removal of sand and gravel from Parcel 3 as there was no substantial evidence to support the same. The trial court made the following determinations in regard to damages:

> "1. Plaintiff is entitled to recover damages for the period of six years immediately preceeding [sic] the filing of the original complaint herein until date, namely, from June 7, 1959, to date.
>
> "2. Defendant is not entitled to an offset for 'avoidable consequences' or for failure to mitigate damages.
>
> "3. Plaintiff is entitled to damages at 12.5 cents per cubic yard of materials removed, which the Court finds would have been a reasonable sum to be paid as royalty during the entire period of wrongful withholding.
>
> "4. Plaintiff is entitled to damages upon the total amount of minerals taken within the low-high water boundaries as established by this Court.
>
> "5. With respect to materials that were removed, the Court finds as follows:

"(a) 574,000 cubic yards of minerals were removed from Parcel 1.

"(b) 56,000 cubic yards of minerals were removed from Parcel 3. The materials so removed were not subject to the lease between the parties and were in addition to the materials removed by the defendant from Parcel 3, which were subject to the terms of the lease between the defendant and the plaintiff.

"(c) No material was removed from Parcel 4.

"(d) 9,000 cubic yards of minerals were removed from Parcel 5.

"(e) 21,000 cubic yards of minerals were removed from Parcel 6.

"(f) No minerals were removed from Parcel 7.

"(g) The total amount of minerals removed from plaintiff's property was 660,000 cubic yards.

"B. Conclusions of Law

"1. Plaintiff is entitled to recover damages in the amount of $82,500 from the defendant.

"2. The damages are unliquidated

and plaintiff is entitled to interest only from the date of Judgment."

The state's witness testified that the royalties for the material removed ranged from 10 cents per cubic yard to 15 cents per cubic yard in the period of time during which the material was removed. There is thus evidence to support the cubic yard royalty figure established by the court. To establish the amount of damages, the state first introduced evidence dealing with the amount of gravel removed by three independent contractors. Records of the amounts dredged by the Joe Bernert Towing Company were furnished by the defendant to the state's fiscal auditor at the Division of State Lands. These records indicated the number of cubic yards removed during each year of the period 1963-1968 (with the exception of 1966 wherein no material was removed by this independent contractor). Evidence was also introduced dealing with the amount removed by the Willamette Tug and Barge Company based on the number of buckets removed during a given period in 1960 and the average number of cubic yards removed per bucket. Finally, Mr. Alfred Millar testified that he had dredged approximately 40,000 cubic yards from the river. Proof as to location of material taken by the independent dredge operators was based on aerial photographs marked by the witnesses as to locations of removal, and estimates of quantities removed between low watermarks in each parcel and between high water and low watermarks.

Proof was also introduced of the amounts of gravel taken by defendant with its own equipment and personnel. The defendant furnished the state its ledger records which had been prepared on a monthly basis for the period July 1, 1959, to December 31, 1970. Raw production totals of materials were shown from the year 1959 through 1970. The state then estimated that at least 50 percent of the amount of the raw materials production came from the riverbed. Adequate evidence was introduced to support this 50 percent figure.

Combining the figures introduced, the following totals were obtained: Parcel 1: 757,588.3 cubic yards (the trial court found 574,000 cubic yards has been removed); Parcels 2A, 2B and 2C: 104,964.9 cubic yards (the trial court awarded these parcels to the defendant); Parcel 3: 120,468.6 cubic yards (the trial court found that 56,000 cubic yards had been taken out prior to July of 1963); Parcel 5: 11,506.4 cubic yards (the trial court found 9,000 cubic yards had been removed); Parcel 6: 26,427.1 cubic yards (the trial court found that 21,000 cubic yards had been removed).

There is evidence to support the trial court's finding in regard to Parcels 1, 5 and 6.

There is a substantial question raised with regard to Parcel 3. While the evidence introduced by the state showed that

over 120,000 cubic yards had been removed, the state makes no claim for these amounts since they relate to material taken subsequent to July 1, 1963, and thus were covered by the lease between the parties. The state, however, argues that the trial court's award of 56,000 cubic yards should be affirmed on the basis that if the court chose to disbelieve defendant's testimony that it had not dredged in the area of Parcel 3 prior to July 1, 1963, the court was certainly at liberty to do so. There is no evidence in the record to support the assertion that any materials were taken from Parcel 3 prior to July 1, 1963, the effective date of the lease, let alone the 56,000 cubic-yard total found by the trial court. The fact that defendant admitted operating in certain portions of the river does not form an adequate basis for the conclusion that it removed the amount found by the trial court prior to July of 1963. This portion of the judgment must be reversed.

V. Interest on Damages

The trial court awarded the state $82,500 in damages for the reasonable value of the use of plaintiff's premises by defendant for the period June 7, 1959, to May 19, 1972. Interest was awarded only from the date of judgment because the damages were "unliquidated." The state contends that it was entitled as of right to interest

as part of its damages.[7]

The majority of jurisdictions allow interest as part of the damages for the detention of land in ejectment and other actions to gain possession of the land, such interest to run from the date of taking. Annotation, 36 ALR2d 337, 354 (1954). However, the Oregon courts have specifically stated in Meyer v. Harvey Aluminum, 263 Or 487, 501 P2d 795 (1972), that interest is not allowable on unliquidated damages. Damages are unliquidated

> "*** where they are an uncertain quantity, depending on no fixed standard, referred to the wide discretion of a jury, and can never be made certain except by accord or verdict." 25 CJS 615, 626, Damages § 2.

While it is not always easy to categorize damages as "liquidated" or "unliquidated," we hold that in the case at bar the damages fall into the "unliquidated" category. In

---

[7]Interest is provided by ORS 82.010:

"(1) The legal rate of interest is six per cent per annum and is payable on:

"*****

"(b) Judgments and decrees for the payment of money from the date of the entry thereof unless some other date is specified therein ***."

Rose City Transit v. City of Portland, ___ Adv Sh ___, ___ Or App ___, ___ P2d ___ (decided August 19, 1974), we allowed interest from the date of the taking of the property in question. However, in Rose City, unlike in the case at bar, the amount and nature of the property taken, the time of taking and the ownership prior to the taking were not at issue. Here, there was active litigation on the amount and location of gravel removed and the ownership of the bed from which the gravel was removed, as well as the value of the gravel removed. In light of all these factors which had to be determined by the finder of fact, it cannot be said that these damages were a sum to be paid in lieu of performance of the contract. See, Medek v. Hekimian, 241 Or 38, 404 P2d 203 (1965). This portion of the trial court's order is affirmed.

VI. Deposition of the State's Expert

On September 20, 1971, defendant filed a motion seeking an order directing that defendant be able to take the deposition of Ronald McReary, the state's expert witness. Defendant further requested that the expert answer all questions put to him relative to the issues of the case and particularly his opinions as to the grounds on which the state claimed ownership of each of the parcels of real property described in the complaint. Further, defendant sought to have the expert produce for examination all physical material, reports, photographs, and

other physical evidence from which he obtained such fa ts forming the basis of his opinion. Argu ent on the motion was heard on September 24, 1971. However, defendant has not designated the transcript of said arguments as part of the record before this court. The trial court denied defendant's motion to depose the expert, but did allow it to have access to relevant supporting da a and information upon which the expert based his opinion.

Depositions of expert witnesses are allowed by ORS 45.151. However, the right to take a deposition may be limited:

> "After notice is served for taking a deposition upon motion seasonably made by any party *** and upon notice and for good cause shown, the court in which the action, suit or proceeding is pending may make an order that the deposition shall not be taken *** or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters ***." ORS 45.181

It is clear that the federal rules of civil procedure relating to discovery and depositions served as a model for the Oregon rules. Richardson-Merrell, Inc. v. Main, 240 Or 533, 402 P2d 746 (1965). Under the federal rules, and thus, by implication the Oregon rules, the granting or denial of a protective order is within the discretion of the trial court. See, 8 Wright and

Miller, Federal Practice & Procedure 267, § 2036 (1970). And, since it is discretionary, only an abuse of that discretion would be cause for reversal. General Dynamics Corp. v. Selb Manufacturing Co., 481 F2d 1204 (8th Cir 1973). In the absence of a transcript of the oral orgument or a showing of a basis of the court's ruling, there is no way this court can say that the trial court abused its discretion and that "good cause" has not been shown.

VII. Splitting of Area into 11 Parcels

In its original complaint, the state described the disputed property as one tract. In its first amended complaint the state split the disputed property into 11 separate parcels and alleged a separate cause of action as to each parcel. The defendant moved to strike the first amended complaint, demurred to it and set up as affirmative defenses both in bar and abatement of the state's alleged arbitrary splitting of a single cause of action.

The "splitting of a cause of action" consists in the commencement of an action for only a part of a cause of action. Wood et ux v. Baker et ux, 217 Or 279, 284, 341 P2d 134 (1950). And, as a general rule, an entire cause of action cannot be divided to be made the subject of two or more actions. 1 Bancroft, Code Practice and Remedies 586, § 384 (1927). One reason for the general prohibition against the splitting of a cause

of action is stated in 1 Bancroft, supra at 586-87:

> "*** If the rule were otherwise, one could split his demand into innumerable parts, thereby multiplying litigation and adding indefinitely to the costs. Moreover, the law does not favor a multiplicity of suits, and requires that all the matters in controversy between parties which may fairly be included in one action be so included."

Accord, Wood et ux v. Baker et ux, supra. Likewise, in Coos Bay Oyster Coop. v. Highway Com., 219 Or 588, 348 P2d 39 (1959), cited by defendant, the court notes that:

> "*** Allowance of separate actions for fractional claims would inevitably result in the pyramiding, duplicating and overlapping of damage items, to the detriment of the condemnor ***." 219 Or at 594.

Defendant contends that the state's splitting of its case into 11 separate claims made the case unduly complicated, and was done solely for the convenience of the state's expert witness. Applying the policy reasons for avoiding the splitting of a cause of action to the facts of this case, it becomes clear that none of the hazards sought to be protected against were present here. First, all of these causes of action were presented in a single

complaint, so there was no danger of the defendant's being harassed by a multiplicity of suits. At the conclusion of the lawsuit, the limits of the property in question, its ownership, and damages, would be determined. As the court noted in Wood et ux v. Baker et ux, supra at 285, where there is no question of a multiplicity of suits there is no violation of the rule against splitting a cause of action. Second, splitting of the one parcel into 11 separate parcels reflects more nearly the various geographical differences and historical origins of the parcels involved. Rather than harassing the defendant, such splitting would make it easier for the factual differences between the parties to be settled.

While Coos Bay Oyster Coop. v. Highway Com., supra, cited by defendant, does support the proposition that interests in land cannot be split into fractional claims, that case involved the attempt to split one interest in real property into several subinterests; this was not the result here. Also, Coos Bay must be evaluated in light of the policy determinants behind the prohibition of a splitting of the cause of action. Viewed in this light, we do not find the splitting of the land in question into 11 separate parcels, each the subject of a cause of action, to be improper.

VIII. Prescriptive Rights

The defendant alleges that the company had, continuously since 1920, conducted sand

and gravel removal operations from the disputed portions of the Willamette River, which removal had been open, continuous, notorious, hostile, exclusive and adverse to the state, and had been known to the state since 1933. The defendant contends that this removal results in the defendant's acquiring an irrevocable property right to remove sand and gravel from the disputed property. The defendant contends that this property right is one of prescription.

There is some authority that a state may lose rights to property through prescription. As noted in 1 Farnham, Waters and Water Rights 225, § 45b:

> "Where the land under tide water may be granted by the state, no reason exists why a private individual cannot establish title under the theory of lost grant. *** [R]ecords may become lost, and it is unreasonable to require the original grant to be produced in all cases. Therefore the presumption of grant may be raised by long possession accompanied by acts of ownership ***."

However, it is important to note that this prescriptive right is limited:

> "*** If the law prohibits the grant of the tide land, no title can be acquired by adverse possession, since no grant can be presumed ***." 1 Farnham, supra at 226.

Between 1878 and 1963, there was no statutory provision by which the state could grant title to any nontidal portion of the Willamette River. See, State v. McVey, supra; Corvallis Sand & Gravel v. Land Board, supra. The authority of the state to grant title to submerged and submersible lands in the Willamette River in the Corvallis area arose after 1963. Since the state has been actively contesting defendant's possession of these parcels since 1958, it is impossible for defendant to contend that there has been a "lost grant" prior to 1963. No prescriptive rights arose against the state.

IX.

Defendant raises several assignments of error which need only brief mention. First, it contends that ejectment will not lie to recover the possession of land under water. This question has, by implication, been decided adversely to defendant's claim in Corvallis Sand & Gravel v. Land Board, supra. See also, Lowndes v. Huntington, 153 US 1, 14 S Ct 758, 38 L Ed 615 (1894); Bates v. Illinois Central Railroad Company, 66 US (1 Black) 204, 17 L Ed 158 (1861).

Defendant's argument that estoppel and acquiescence in the trespass should apply against the state in this case was also decided adversely to defendant's position in Corvallis Sand & Gravel Co. v. Land Board, supra, 250 Or at 328-29. The same policy considerations that militated against the

allowance of the defense of laches in that case apply alike to the defense of estoppel and acquiescence.

Defendant's argument that the statute of limitations applies is without support. ORS 12.250.[8]

Finally, defendant raises certain constitutional challenges to both the ejectment statutes, ORS 105.005, et seq, and the ejectment proceeding as a whole. Both of these points could have been raised in the earlier challenge to the proceeding in Corvallis Sand & Gravel Co. v. Land Board, supra, but were not. Even assuming that these arguments are meritorious, defendant is foreclosed from raising them now.

In sum, we affirm the judgment of the trial court in all respects with the exception of the award of damages for Parcel 3, which award we reverse.

Affirmed in part; reversed in part.

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[8]"Unless otherwise made applicable thereto, the limitations prescribed in this chapter shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit." ORS 12.250.

APPENDIX D

OREGON SUPREME COURT

HOWELL, J.

This is an action in ejectment brought by the state pursuant to ORS 105.005 et seq. The state sought to obtain posession of the Willamette riverbed in the Corvallis area and damages for the reasonable value of the defendant's use of portions of that riverbed. The trial court awarded to the defendant certain portions of the riverbed within an area known as Fischer Cut and awarded other disputed portions to the state. Both parties appealed the judgment of the trial court to the Court of Appeals. The Court of Appeals affirmed the trial court's division of the parcels of land involved but reversed the trial court's award of damages for defendant's use of an area known as Parcel 3.

The history of this litigation and the numerous legal and factual issues are set forth in the opinion of the Court of Appeals, Land Bd. v. Corvallis Sand & Gravel, 99 Adv Sh 1532, ___ Or App ___, 526 P2d 469 (1974). We agree with the Court of Appeals that there was substantial evidence in the record to support either the theory that Fischer Cut of the Willamette was formed by an "avulsive" process or by the "exception to the accretion rule" process as described by the federal court in Commissioners v. United States, 270 F 110, 113-14 (8th Cir

1920). We accepted defendant's petition for review solely on the question concerning the length of the Fischer Cut area through which the Willamette River has coursed since a major flood in 1909.

The trial court made the following findings regarding Fischer Cut:

> "1. Fischer Island from 1853 to 1909 was a peninsula-like formation around which the Willamette River coursed.
>
> "2. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed known as Fischer Cut.
>
> " *****.
>
> "4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.
>
> " *****.
>
> "6. As a result of a flood of November 25, 1909, the river suddenly and with great force and violence converted Fischer Cut into the main channel of the river.
>
> "7. The change was not gradual and imperceptible, but was a rapid and

> violent change of course, avulsive in character and constituted an avulsion.
>
> " *****."

The trial court awarded Parcels 2A, 2B and 2C to the defendant. These parcels lie between the lines of ordinary high water and encompass a riverbed distance of 1250 feet. In addition to this award, the trial court added to the length of riverbed awarded to the defendant the area downstream from the end of Parcels 2A, 2B and 2C to the confluence of the East River Channel and the Willamette River. This area came from part of Parcel 3 and was made, as the state conceded at oral argument, on the basis of the statutory grants available to riparian owners between 1874 and 1878.

On appeal to this court, the state maintains that the trial court's findings regarding the length of Fischer Cut are correct. However, Corvallis Sand & Gravel contends that Fischer Cut is 3200 feet in length and that the trial court's finding of the length of the Cut is not supported by the evidence.

The evidence concerning the length of Fischer Cut consists of various documents and testimony. The asserted 1250-foot length of Fischer Cut coincides with the linear riverbed distance of Parcels 2A, 2B and 2C which the state first claimed in its 1969 complaint. The state argues that

portions of the Fischer Cut area eroded away between 1890 and the 1909 flood. At trial, the state's expert witness, Ronald McReary, utilized a 1936 aerial photograph to point out an alleged cutbank on the upstream side of Parcels 2A, and 2B, thus suggesting that the Cut was only 1250 feet long. The state also relied upon the testimony of one of its witnesses, Fred Fischer, who, as a boy, roamed through the area of Fischer Cut and who testified that the Willamette River moved east and took several acres of land with it. However, the state, in attempting to prove its erosion theory and the 1250-foot figure, relies on documentary evidence showing the area after the 1909 flood. Further, Mr. Fischer's testimony, taken as a whole, fails to explain whether the erosion he referred to occurred before or after 1909.

The evidence that Fischer Cut at the time of the 1909 flood was 3200 feet in length is substantial and highly persuasive. The trial court found that in 1906 the Fischer Cut was in practically the same location as it was in 1890 and that until 1909 the Willamette River continued to flow around Fischer Island. In 1890 the U. S. Army Corps of Engineers carefully mapped this stretch of the Willamette River, including the area of Fischer Cut. The 1890 Clapp map shows the existence of an overflow channel in the Fischer Island area. Both parties stated that this map was carefully drawn and prepared. The scale shows that the overflow channel from "upstream"

to "downstream" points is approximately 3200 feet in length.

Later, in 1906, three years before the flood, Major G. W. Roessler of the Corps of Engineers sent Assistant Engineer David B. Ogden to examine the overflow channel in the area of what today is known as Fischer Island. Ogden's report to Roessler states, in pertinent part:

> "The channel in question is across the neck of a peninsula and is some 3200 feet long, while the distance around by the main river is two and one-quarter miles.
>
> "This channel has existed for a number of years as maps on file in this office show it in practically the same location in 1890, though the mouth of the channel was then closed by a gravel bar. The fall from its head to its food [sic] is noted as about 8 feet. The approximate location is shown in dotted lines on the sketch herewith."[1]

In addition, the state's witness stated

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[1]The distance on the sketch accompanying the engineer's report scales at slightly less than the 3200 feet stated in the body of the letter. However, the 1906 sketch did not purport to represent the exact length of the cutoff or overflow channel, only its approximate location.

on cross-examination:

> "*** I would say the best evidence of it [the length of the eroded chute] is the distance shown on the map of 1890 which appears to be a very carefully prepared and well-engineered drawing and I would say that that is the length of the gully that eventually eroded into what is now the bed of the river."

We find that the best evidence of the length of Fischer Cut at the time of the 1909 flood is the 1890 map, which both parties agreed was carefully prepared and which shows Fischer Cut to be approximately 3200 feet in length.

It is difficult, based on the present record, to correlate the length of Fischer Cut in 1909 to the topography as it existed at the time of trial. We do find, however, that the length of Fischer Cut as it existed in 1909 at the time of the flood is best represented by the channel from point A to point B as shown on the 1890 map. We remand this action to the Court of Appeals with directions to remand to the trial court to correlate points A and B with the present topography of the area. Additional testimony may be taken if necessary. Also, on the remand, the trial court should modify or adjust any damages in accordance with our decision herein expanding the length of Fischer Cut. In all other respects the decision of the Court of Appeals is affirmed.

Affirmed as modified.

APPENDIX E

ORDER DENYING PETITION FOR REHEARING

HOWELL, J.

In our original opinion we emphasized that we accepted the defendant' petition for review of the decision of the Court of Appeals on the sole issue of the length of Fischer Cut as it existed at the time of the 1909 flood. We held that the length of Fischer Cut as it existed in 1909 was best represented by the channel from Point A to Point B as shown on the 1890 map and remanded the cause with directions to the trial court to correlate Points A and B with the present topography of the area and to modify or adjust any damages accordingly.

Both parties have filed petitions for rehearing. The defendant's petition raises no new matter and is denied. The petition of the plaintiff, the State of Oregon, expresses concern that our opinion could be interpreted to include as an award to defendant a portion of the riverbed in Parcel 3 which the plaintiff leased to the defendant in 1963 and which defendant has admitted in its pleadings that it had no ownership therein.[1]

---

[1]The plaintiff leased to defendant "That portion of the bed of the Willamette River owned and controlled by the State of Oregon

To prevent any misunderstanding, our former opinion is clarified to the following extent: if correlating Points A and B of Fischer Cut results in any portion of that length falling within a portion of the riverbed to which the defendant has disclaimed ownership, then the ownership of plaintiff remains unaffected.

Both petitions for rehearing are denied.

beginning at its confluence with East River (East Channel of the Willamette River) and extending downstream 4000 feet all in section 2 Township 12 South Range 5 West Willamette Meridian."

The defendant's amended answer alleged: "Defendant is the owner in fee simple of the property described in defendant's amended complaint, except that defendant does not own that portion leased by plaintiff to defendant ***." (Emphasis supplied)

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-577

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Petitioner,

v.

STATE OF OREGON, Acting by and through the State Land Board,

Respondent.

BRIEF FOR RESPONDENT STATE OF OREGON IN OPPOSITION TO THE PETITION FOR CERTIORARI OF THE CORVALLIS SAND AND GRAVEL COMPANY

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STATE OF OREGON, Acting by and through the State Land Board,

Respondent.

BRIEF FOR RESPONDENT STATE OF OREGON IN OPPOSITION TO THE PETITION FOR CERTIORARI OF THE CORVALLIS SAND AND GRAVEL COMPANY

Respondent State of Oregon in principle opposes the petition of the Corvallis Sand and Gravel Company for the reasons hereinafter noted. Notwithstanding these reasons Respondent urges the Court to take jurisdiction of the petition (as well as of the petition in Case No. 75-567) to put to rest, for once and for all, the questions raised by the language of this Court in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).

OPINIONS BELOW

The opinions and facts pertaining thereto are adequately set forth in the petition and appendix thereto of the State of Oregon in Case No. 75-567.

QUESTIONS PRESENTED FOR REVIEW

Respondent concurs in petitioner's Statement of the Questions.

STATEMENT OF FACTS

Respondent concurs in petitioner's Statement of the Facts.

ARGUMENT

THE DECISION BELOW WAS CORRECT

Petitioner relies on *Bonelli Cattle Co.*, 414 U.S. 313 (1973) for the proposition that the State of Oregon has no proprietary interest in its navigable river beds sufficient to support an action for ejectment in the absence of allegations and proof that the respondent by its actions was interfering with public navigation, fishing and related uses. Petitioner also contends that the state's title is only a sovereign interest to protect navigation and commerce and does not constitute a proprietary interest in its riverbeds. Therefore, even if such an interference had been alleged, the state would in no event be entitled to damages for defendant's taking of sand and gravel from the riverbed. The language of the Court in the *Bonelli* case has led to this contention (and to other litigation in the state challenging the existence of a disposable property interest in the state's title to its navigable riverbeds).

We submit it is clear, however, that the state has a *complete* fee simple title in the beds of its navigable waterways which is defeasible only by reliction of the water from the bed and subject only to the overriding powers of the United States to control navigation and commerce. Because of this fact, the state has a sufficient proprietary interest in its navigable riverbeds to permit royalty leases for the removal of sand and gravel and other minerals from such beds, to sell parcels of such beds (providing public navigation and commerce are not thereby obstructed), and finally to lease parcels in such beds for private uses and purposes. *See: Hardin v. Jordan,* 140 U.S. 371, 402 (1891); *Illinois Central R. Co. v. Illinois,* 146 U.S. 387, 452-453 (1892); *Shively v. Bowlby,* 152 U.S. 1, 43, 46-47, 48-50 (1893), *United States v. Holt State Bank,* 270 U.S. 49, 54-55 (1926), *United States v. Oregon,* 295 U.S. 1, 14 (1935), *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313, 319-320 (1973), *Workman v. Boone & Kingsbury,* 206 Cal. 148, 273 P. 797 (1928), *cert. den.* 280 U.S. 517 (1929).

ALTHOUGH THE DECISION BELOW WAS CORRECT, THE COURT SHOULD TAKE JURISDICTION OF THE IMPORTANT FEDERAL QUESTION RAISED IN THIS CASE IN CONJUNCTION WITH THE IMPORTANT FEDERAL QUESTION RAISED IN CASE NO. 75-567 TO RESOLVE THE SERIOUS AMBIGUITIES RAISED BY THE **BONELLI** DECISION

It should be apparent by now that the questions before this Court in Case No. 75-567 and in this case (No. 75-577) are but two sides of the same coin. This case (No. 75-577) raises the question whether the state has a disposable property interest in its navigable riverbeds. If the state does have such an interest, then Case No. 75-567 raises the question whether this Court's rule of avulsion as applied in the *Corvallis* case (No. 75-567) is not in fact so unworkable, that as a practical matter the state cannot enjoy its proprietary interest. In a nutshell ,if the rule of avulsion requires constant and complex litigation to establish public ownership, the state's proprietary interest is of little value.

CONCLUSION

We think the Oregon courts correctly decided the federal question of the state's right to damages in the ejectment case because the state does in fact have a disposable property interest in its navigable riverbeds. However, that question is too important to be resolved on a denial of certiorari. And, as noted by the petitioner in Case No. 75-567 and by the petitioner in this case the Court's language in *Bonelli* raised far more serious questions than it answered. The Court should therefore take jurisdiction of the petitions in both cases and put those questions to rest.

Respectfully submitted,

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In the Supreme Court of the United States

October Term 1975

No. 75-577

CORVALLIS SAND AND GRAVEL COMPANY,
an Oregon corporation,

Petitioner,

v.

STATE OF OREGON ex rel State Land Board,

Respondent.

BRIEF OF PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 57-577

CORVALLIS SAND AND GRAVEL COMPANY,
an Oregon corporation,

Petitioner,

v

STATE OF OREGON ex rel State Land Board,

Respondent.

BRIEF OF PETITIONER

STATEMENT OF FACTS

The State of Oregon (State) filed a statutory ejectment action[1] in the Circuit Court of the State of Oregon against Corvallis Sand and Gravel Company (Corvallis Sand) to recover the bed to high

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[1] At common law ejectment was a possessory action. Under Oregon law such a proceeding determines title. Weatherford v. McKay, 59 Or 558, 560, 119 Pac 969 (1911).

water mark of the Willamette river, a fresh water stream which has traditionally been considered navigable. State's claim of ownership was based on sovereignty. The complaint contained no allegation that Corvallis Sand was in any way interfering with the public right of navigation, fishery or related uses. (Public rights.) State also sought damages for removal of sand and gravel materials from the bed of the river at the going royalty rate per cubic yard. (A. 5)[2]

Corvallis Sand was a riparian owner of the bank adjacent to the disputed property.

Corvallis Sand demurred to the complaint on the ground the same failed to state facts sufficient to constitute a cause of action. (A. 26) The demurrer was overruled. (A. 27)

The evidence adduced at the trial established that Corvallis Sand had been conducting sand and gravel removal operations in the area continuously since about 1920 and that State had had actual notice of the operations since not later than 1933. (Ex. 33).[3]

The sand and gravel removal operations had been conducted under permits issued by the Army Corps of Engineers. (Exs. 280-307)

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[2] A. refers to Appendix.

[3] This was an opinion of the Attorney General of Oregon ruling that Corvallis Sand's operations in the area were in violation of the state's property rights. Ops. A.G. of Oregon, 1933-34, p. 375.

The trial court entered judgment granting portions of the disputed property to high water mark to State and awarding it money damages for sand and gravel removed from those areas. (A. 190)

On appeal, the Oregon Court of Appeals and the Supreme Court of the State of Oregon affirmed the overruling of the demurrer and the award of the property (except for a small area) and damages.

SUMMARY OF ARGUMENT

(The "Statement of Facts" is incorporated by reference.)

I

Ownership of Beds of Navigable Fresh Water Streams.

- - - - - -

The recent decision of Bonelli Cattle Co. v. Arizona, 414 US 313, 36 L.Ed.2d 526, 94 S.Ct. 517 (1973) held that the ownership of the beds of navigable fresh water streams is a matter of federal common law, that the states' interest in the beds of navigable fresh water streams is limited in nature and recognized the importance of riparian ownership. The decision also expressee concern over the taking of property without just compensation as applied to riparian owners.

The primary issue in this case is the determination of the rights of the state and of the riparian in the beds of navigable fresh water streams.

At common law, both in England and in this country, the sovereign or state owned the beds of navigable streams up to the head of tide water. This ownership was dual in nature, one being the jus publicum (public rights) which was a trust obligation of the Crown or the state to protect the public in its use of tidal waters for purposes of navigation and fishing. The public rights were inalienable, were paramount to the jus privatum (private rights) and could not be destroyed or made conditional.

The private rights were a proprietary interest which the King or a state held in the bed of tidal streams. Private rights could be, and were, sold, given away and otherwise disposed of, always subject to the public rights.

Under the common law the public had a right to navigate on fresh water streams but the private rights were vested in the riparian owners to the thread of the stream.

Most of the original 13 states adopted the common law as it applied to the ownership of the beds of tidal and fresh water navigable streams. Some subsequently modified the law either by statute or by judicial decision.

Most of the states subsequently admitted to the Union have, either by constitutional or statutory provision, declared that the general common law was adopted. However, in deciding the relative rights of the state and the riparian in navigable fresh water streams some states followed the applicable common law, others declared that the riparian owns

only to low water and others, such as Oregon, declared that the bed is owned from bank to bank by the state. At least one state, Washington, has gone so far as to declare that the riparian has no rights, that the fresh water stream can be diverted rendering riparian land non-riparian, all without compensation. This court has endorsed the ruling.

The result is that no area of law has "produced more uncertainty, caused greater conflict of opinion ... [and] produced more diverse results that that relating to the title to land under the waters".

The different rules have also resulted in complex litigation and adoption of diverse rulings as to what constitutes high water, low water, accretion, and other essentials of riparian ownership.

Another consequence has been the taking by state courts of riparian property without due process, the courts often doing so arbitrarily, without legal precedent and in violation of legal precedent.

The sources of the diverse rulings have been the following:

1. Failure to distinguish between the public rights and the private rights and to recognize that the protection of the public rights is not dependent on ownership of the underlying bed and is not related to such ownership. Many courts have failed to perceive the distinction between the two and their significance. The result has been a blending of the concepts into a "trust" theory under which states

have claimed total ownership of navigable fresh water streams and have failed to recognize that the state's proprietary interest is limited to tidal waters.

2. Failure to understand and properly apply the "equal footing" doctrine.

This doctrine, contained in the admission acts of new states, requires that new states be admitted on an "equal footing" with the original 13 states as to political and sovereign matters. The doctrine requires that new states are not inferior or superior to the original 13 states. In the area of riparian ownership, the doctrine has been misinterpreted to permit the new states to enter on a footing superior to the original 13 states. The result has been that the courts of many new states, in violation of due process and of their constitutional and statutory provisions making the common law binding, have declared that riparians have less interest in the beds of navigable fresh water streams than riparians in the original states.

3. Misunderstanding of the significance of the provision in the various admission acts that the navigable streams shall be "public highways". Some courts have seized upon this declaration as a basis for declaring that the state owns the beds of all "public highways". The concept of public highways is part of the basic concept of public rights of navigation and is unrelated to the ownership of the beds, such ownership being part of the private rights.

4. The exercise of authority by the state courts to arbitrarily declare the rights of riparians on fresh water navigable streams. State courts, unhindered, have determined the relative rights of the states and the riparian owners in the beds of navigable streams. The source of this authority is obscure. In making determinations of ownership the courts have not only violated due process but have arbitrarily taken unto themselves authority which should properly be vested in the people or in the legislature -- the power to determine the proper rights of the state in the beds of navigable fresh water streams and the disposition of those rights.

5. Failure to apply the common law. The common law is based on wisdom born of experience. It is simple, it is unfettered with problems of high water, low water, and other related issues. By applying the common law, that is, by declaring that the private or proprietary rights on navigable fresh water streams belong to the riparian, subject to the public rights of navigation and related uses (now expanded to include recreation) the vast controversy in this area would be resolved.

II

Right of State to Claim Damages for Removal of Sand and Gravel.

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The trial court awarded money damages to State on a cubic yard basis for sand and gravel materials removed from the bed of the river by Corvallis Sand.

At common law the riparian had the right to remove stone and sand so long as he did so without injury to other individuals or the public.

Bonelli, supra, declared that the "state's title is to the 'river bed as a bed'", citing State v. Gill, 259 Ala 177, 181, 66 So.2d 141, 145 (1953). In Gill the Alabama court stated of the state's ownership of the bed of a navigable fresh water stream:

> "... is a title to the bed as a bed and not the individual grains of sand or lumps of mud that constitute the land making up the bed."

The limited nature of the state's interest in the beds of navigable fresh water streams is in the public rights of protecting navigation and related uses. It has no proprietary interest in the beds and specifically does not own the individual grains of sand or pebbles of gravel.

State cannot collect damages for removal of sand and gravel materials in the face of proof the removal operations were conducted under permits granted by the Army Corps of Engineers.

PROPOSITION I

IN THE ABSENCE OF PLEADING AND PROOF THAT THE PUBLIC RIGHTS OF NAVIGATION, FISHERY AND RELATED USES ARE BEING IMPAIRED OR INTERFERED WITH THE STATE OF OREGON CANNOT MAINTAIN EJECTMENT AGAINST A RIPARIAN OWNER TO RECOVER THE BED OF A FRESH WATER NAVIGABLE STREAM WHERE ITS CLAIM OF OWNERSHIP IS BASED ON SOVEREIGNTY RATHER THAN GRANT.

ARGUMENT

At the time our country was formed it was the common law both in England and in the United States that the beds of navigable fresh water streams belonged to the riparians, the ownership extending from the respective banks to the thread. 1 Farnham, Waters and Water Rights (hereafter cited as Farnham), Sec. 51, note 18.(4)

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(4)"In Avery v. Fox, 1 Abb. (US) 246, Fed. Case No. 674, it is said the law is too plainly settled to allow discussion at this day that the owner of land bordering on a nav igable stream in which the tide does not ebb and flow owns the bed beneath the water to the center of the stream."

Under the common law the riparian owned to the thread on fresh water streams, whether navigable or not.

(Under the common law the state owned the beds and waters of tidal streams which were capable of navigation for commercial purposes. 78 Am.Jur. 2d 817, Waters, Sec. 380.[5])

On becoming sovereign, the original 13 states adopted the following rules as to the ownership of the beds of navigable fresh water streams to the head of tidewater:

1. The following original states adopted the common law: Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, South Carolina[6] and Rhode Island[7].

2. In Pennsylvania the riparian owned the soil to low water on navigable fresh water streams but the state owned between the low water marks. Farnham, Sec. 53(c), p. 254. The basis of the rule appears to be the unique status of Pennsylvania's land which had been owned by William Penn as a proprietorship under grants from the Crown. Gould, Law of Waters (hereinafter cited as Gould), Sec. 65.

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[5]For a detailed analysis of the history of the ownership of the beds of navigable fresh water streams see Shively v. Bowlby, 152 US 1, 38 L.Ed. 331, 14 S.Ct. 548 (1893).

[6]Farnham, Sec. 51, p. 246. New York excepted the Hudson River above tidewater.

[7]Gould, Sec. 172

3. Virginia initially followed the common law until the passage of a statute in 1819 (which applied to subsequent grants only) which reserved the bed between low water marks to the state. Farnham, Sec. 52, p. 253 and Gould, Sec. 178.

4. North Carolina initially followed the common law but then adopted a statute reserving the bed between high water marks to the State. Gould, Sec. 60. This applied only to rivers in which seagoing vessels could navigate. Farnham, Sec. 52, p. 252.

States since admitted to the Union have adopted the following rules of ownership:

1. Follow the common law: Illinois, Kentucky, Maine, Michigan, Nebraska, Ohio, Washington, and Utah. Farnham, Sec. 51, p. 251.

2. In the following states the riparian owns to low water: Alabama, Indiana, Louisiana, Minnesota, Missouri, Montana, South Dakota, Tennessee, Vermont and West Virginia. Vol. I, Waters and Water Rights, The Allen Smith Co., 1967 (hereinafter cited as Smith), Sec. 42.2(B), p. 270.

3. In the following states the state owns the beds of navigable fresh water streams from high water to high water: Arkansas, Florida, Idaho, Iowa, Mississippi, Oregon, and Wisconsin. 78 Am. Jur.2d 829, Waters, Sec. 386.

4. Texas applies a special rule. Pre-1837

Mexican and Spanish grants include the bed of the stream. Post-1836 grants stop at the bank if the stream retains an average width of 30 feet from the mouth up. Smith, Sec. 42.2(C), p. 272.

(The above lists are not entirely correct as some states change their rule from time to time while others reach different conclusions depending on the situation in each case.)

5. States with identical basic law have arrived at diametrically opposite conclusions as to ownership of beds of navigable fresh water streams, Oregon and Nebraska being an example.

Oregon was admitted to the Union in 1859. Its original constitution contains a provision continuing in force all laws of the territory of Oregon. Article XIII, Sec. 7.[10] Included in the territorial law was article 1 of section 2 of the Oreganic law of the provisional government of Oregon adopted July 26, 1845, which entitled the people to the benefits of the common law.[11] The Oregon supreme court has ruled that the common law is in

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[10]"All laws in force in the territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered or repealed."

[11]"The inhabitants of said territory shall always be entitled to the benefits of the writ of habeas corpus and trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings, according to the course of common law."

force in Oregon.[12] Oregon nevertheless holds that the state owns the beds of fresh water navigable streams from high water to high water. (Supra p. 11)

Nebraska, admitted in 1867, has ruled that by virtue of a statute adopting the common law the state has no interest in the beds of navigable fresh water streams. Kinkead v. Turgeon, 109 NW 144, 744-45 (1906).[13]

The diversity of rules as to the ownership of the beds of navigable fresh water streams has provoked the following comments:

> "Of all the difficult questions which have arisen in the application of the law to questions involving water rights, there is none which has produced more uncertainty, caused greater conflict of opinion, or

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[12] "That the common law of England modified and amended by English statutes, as it existed at the time of the American Revolution, as far as it was general and not local in its nature and applicable to the conditions of the people and not incompatible with the nature of our political institutions or in conflict with the constitution and laws of the United States or this state, except as modified, changed or repealed by our statutes, has been adopted and is in force in this state ..." United States F.&G. Co. v. Bramwell, 108 Or 261, 264, 217 Pac 332 (1923).

[13] The Nebraska court uses language almost identical to that of the Oregon court in describing the role of the common law in that state.

produced more diverse results than that relating to the title to the land under the waters. This difficulty and diversity of result has arisen from either failure to perceive clearly the common-law principles applicable, or a hesitation to apply them for fear of the result."

Farnham, Sec. 30, p. 165

"There has been much conflict as to the title of land under water. In many instances, different conclusions have been arrived at in the same jurisdiction under various circumstances, and the courts have differed in the method of reasoning, as well as in respect of the grounds which have influenced their determination. Since each state in this country has been at liberty to determine over what submerged lands its sovereign prerogative of ownership shall be exercised, many and diverse views have been adopted. In some states statutes have been passed modifying or abrogating the common-law rules and presumptions, while in others the courts have been permitted either to follow the common-law or civil-law rules relating to boundaries, or to establish their own doctrines."

56 Am.Jur. 864, Waters, Sec. 451

The sources of the confusion as to the relative rights of the state and the riparian are the following:

1. Misunderstanding of the concepts of jus publicum and jus privatum.

2. Misapplication of the equal footing doctrine.

3. Misunderstanding of the designation in admission acts of navigable waters as being "common highways and forever free".

4. Misunderstanding by the state courts of their authority to claim or disclaim ownership of the beds of navigable fresh water streams.

5. Misapplication of the federal definition of navigability adopted for purposes of the commerce clause in the determination of the ownership of beds underlying fresh water streams.

6. Failure to apply the common law.

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1.

Misunderstanding of the Concepts of Jus Publicum and Jus Privatum.

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Under the common law the jus publicum (public right) was the right of passage and repassage by the public over water with their goods. The water was not to be obstructed by nuisances. Farnham, Sec. 36, p. 167. It was the right of the public to use the sea, its arms and rivers, where the tide ebbed and flowed, and the shore below high water mark, for the development of commercial navigation. Bards v.

Herman, 114 NYS 1098, 1101, 62 Miss. 428. It also included the public right of fishery. Gould, Sec. 24, p. 51. It was the right of jurisdiction and control by the King or state for the benefit of its citizens, which is similar to the jurisdiction over public highways by land, where the underlying fee may be in private ownership. In England the King, and in this country the state, may intervene to protect the public rights. The rights are inalienable by the state and any attempted conveyance of them is a nullity. The private rights are at all times subject to the public rights. Gould, Sec. 17, p. 34 and following, Farnham, Sec. 36, p. 138. The concept of jus publicum applied only to tidal waters. Farnham, Sec. 36, p. 168.

In lands under tidal waters there existed concurrently with the public rights the jus privatum (private rights). These were proprietary in nature and were subject at all times to the public rights. Gould, Sec. 17, p. 35 and Bards, supra.(14)

The King could and did dispose of the public rights. Farnham, Sec. 36, p. 166.(15)

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(14)"The 'jus privatum' was the right of the King to convey and vest in others of his private will the title to and over the sea, its arms and rivers, where the tide ebbed and flowed, and the shore below high-water mark, subject however to the jus publicum. The term 'jus publicum', however defined, included the ownership of the soil between high and low water marks.

(15)"The King granted title under the water, and exclusive fishery rights therein, as suited

Farnham states:

> "The governmental or prerogative power of the English crown has inadvertently been transformed into a trust by some of the courts in the United States, the result of which has been to carry the decisions beyond what would be possible under the common-law theory, and which, if continued, may result in needless inconvenience, if not in actual obstruction of progress."
>
> Farnham, Sec. 36(a), p. 172

Citing Martin v. Waddell, 16 Pet. 367, 10 L. Ed. 997, Farnham quotes from the opinion of Chief Justice Taney on the validity of a grant of fishery rights to the proprietors of New Jersey:

> "The country mentioned in the letters patent was held by the King in his public and regal character, as the representative of the nation and in trust for them ... The dominion and property in navigable waters and in the lands under them being held by the King as a public trust, the grant to an individual of an exclusive fishery in any portion of it is so much taken from the common fund entrusted to his care for the common benefit."

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his pleasure. And there is no doubt that all land under the water which could be profitably used by the individuals passed into private ownership."

(For detailed discussion of jus privatum and jus publicum see Farnham, Sec. 36.)

Farnham comments:

> "This language applied solely to the governmental or prerogative right of the Crown and did not in any way affect its property or private right. But a failure to distinguish between these two rights has in some instances been extended so as to include both the prerogative and the private right, so that it has been held to preclude any grant by the state of its title under navigable water, even though such grant might be greatly to the public advantage by the filling and reclaiming of lands which were useless for any purpose of navigation or fishery. This doctrine has been carried further in Wisconsin than elsewhere, the court holding that the state has no proprietary interest in the land under the water, but holds it in virtue of its sovereignty, and in trust for navigation and fishery."
>
> Farnham, Sec. 36(a)

Farnham then points out that the public rights are paramount and inalienable.

In short, the public rights are nothing more than a navigational and recreational[16] servitude. The private rights are no different than property rights in dry land except they are subject to the public rights.[17] Whether it is stated that the

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[16] The public rights have been expanded to include recreation. Smith, 37.2(C), p. 209-210.

[17] Gould, Sec. 17, p. 35 draws the analogy

private rights are subject to the public rights, or that the title is held for the public, the legal meaning is identical. Smith, Sec. 37.2(C), p. 209-210.

Those authorities which have misunderstood the nature and significance of the trust obligation of the state have converted it into an ownership concept on the part of the state rather than recognizing it is a duty on the part of the state to protect the public use of navigable waters. Farnham, Sec. 36(a).

Some states, such as Oregon, have gone so far as to convert the concept of the public rights and the private rights into a profit-making enterprise for the benefit of the state treasury. ORS 327.405.(18)

The courts of Oregon have refused to recognize the existence of statutes authorizing the sale of beds of navigable streams which have been continuously in effect since 1899. State v. Corvallis Sand and Gravel Co., 526 P2d 469, 487.(19)

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to a public highway (jus publicum) located on private property.

(18)(Oregon Revised Statutes) "The common school fund shall be composed of the proceeds from ... the sale of submerged and submersible lands ..."

(19)"Between 1878 and 1963, there was no statutory provision by which the state could grant title to any non-tidal portion of the Willamette River. See State v. McVey, supra, Corvallis Sand

The merger of the public rights and private

and Gravel v. Land Board, supra. The authority of the state to grant title to submerged and subersible lands in the Willamette River in the Corvallis area rose after 1963."

The following was set forth in Corvallis Sand's brief on appeal to the court of appeals and petition for review by the Supreme Court of Oregon:

"6. Laws of 1899 (page 148) (Section 8) authorized the State Land Board to sell 'tide lands, tide flats not connected with the shore, and all lands held by the state by virtue of her sovereignty, ***' (Emphasis supplied) (As stated in Taylor Sands Fishing Company vs State Land Board, 56 Or 157, 159, 108 Pac 126 (1910)"

'This section was enacted in 1899, probably as a consequence of the decision in Elliott vs Stewart, 15 Or 259 (14 Pac 416), in which case it was held that under the prior law, providing for the disposal of State lands, no authority had been conferred to convey the title to sand bars in the Columbia River not connected with the shore. Oregon, on its admission to the Union, February 14, 1859, became the owner of all that part of the Columbia River, a navigable stream, lying south of the north boundary of the State. Act February 14, 1859, c. 33, 11 Stat. 383. Subject to the paramount right of navigation, Oregon, when it was thereafter empowered by enactment could, by its constituted agents, convey any of the islands in that river or any land forming a part of its bed.' (Emphasis supplied).)

rights into an indivisible entity has led some

"By the 1899 act the legislature expressed its disapproval of the courts' position that the state couldn't sell the beds of navigable streams.

"7. Laws of 1907 (Chapter 117, Section 9) 'The State Land Board is hereby authorized to sell or lease all lands owned by the State'. (This was a general revision of the 1878 act and amendments subsequent thereto.)

"8. Laws of 1920 (Chapter 32, Section 1):

'The State Land Board hereby is authorized to lease the beds of navigable portions of navigable streams for the purpose of removing gravel, rock and sand therefrom.' (Balance of statute deals with bidding.)

"9. Laws of 1943 (Chapter 175, Section 4) (amending Laws of 1907, Chapter 117):

'The State Land Board hereby is authorized to sell or lease all lands owned by the state, and to make such rules and regulations, ***'

"10. Laws of 1963 (Chapter 376, Section 3):

'The State Land Board shall have the power to sell, lease or trade submersible or submerged lands owned by the state and new lands created upon submersible or submerged lands owned by the state in the same manner as provided for tide and overflow lands***'

"'Submersible' lands were defined in Section 1 as:

" 'Means those lands which lie between the line of ordinary high water and the line of ordinary low water of the navigable rivers of this state whether such waters be tidal or non-tidal.'

states to deprive the riparian owner on navigable fresh water streams of any of his natural property rights. 78 Am.Jur.2d 706, Waters, Sec. 262, 65 CJS 216, Navigable Waters, Sec. 61. This court has approved the rule. Port of Seattle v. Oregon and Washington R. Co., 255 US 56, 41 S.Ct. 237, 65 L.Ed. 500, 506 (1920).(20)

"'Submerged lands were defined as:

"'Means those lands which lie below the line or ordinary low water of the navigable waters of this state whether such waters be tidal or non-tidal.'."

(20)"Under the law of Washington (which differs in this respect from the law generally prevailing elsewhere) a conveyance by the state of uplands abutting upon a natural navigable waterway grants no right of any kind, either in land below high water mark (Eisenbach v. Hatfield, 2 Wash. 236, 12 LRA 632, 26 Pac 539), or in, to or over the water (VanSiclen v. Muir, 46 Wash. 38, 41, 89 Pac 188), except the limited preferential right conferred by statutes upon the owner of the upland, to purchase the shoreland if the state concludes to sell the same. Act of March 26, 1890, Section 11 and 12, Laws of Washington 1899-1890, p. 435. The grantee of the upland cannot complain of another who erects a structure below high water mark. Muir v. Johnson. He does not acquire any right of access over the intervening land and water area to the navigable channel. Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 550, 551, 109 Pac 833. So complete is the absence of riparial or littoral rights that the state may--subject to the superior right of the United States--wholly divert a navigable stream,

Farnham criticizes the rule severly. Farnham, Sec. 63, p. 281.[21] See also 78 Am.Jur.2d 706, Waters, Sec. 262.

This court has recognized that riparianess is one of the "most valuable feature[s]" which land bordering on water may have. Bonelli, supra, 38 L.Ed. at 539.

American Jurisprudence 2d fails to recognize that the public rights do not include riparian rights. 78 Am.Jur.2d 704, Waters, Sec. 261.[22]

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sell the river bed, and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water. Newell v. Loeb, 77 Wash. 182, 193, 194, 137 Pac 811; Hill v. Newell, 86 Wash. 227, 228, 149 Pac 951."

[21]"The right of the riparian owner to have the stream continue in place, and to make such use of it as he can while the water flows past his property, certainly must be a proprietary right. It does not depend on the acquiescence or good will of the state, and is a right of which the riparian owner cannot be deprived without receiving compensation. ... The rights attached to riparian ownership are not affected by the character of the water and depend upon lateral contact with the water, and not upon ownership of the soil under water."

[22]"Riparian rights in the several states are settled by the respective states for themselves. It is for the state to determine to what waters, and to what extent, the prerogatives of the state shall

Riparian rights are proprietary. The only limitation on the riparian is that in the exercise of his rights there be no interference with the public rights. 78 Am.Jur.2d 534, Waters, Sec. 90.

Most jurisdictions have adopted the common law which protects the riparian in his rights. 78 Am. Jur.2d 704, Waters, Sec. 261 citing Shively v. Bowlby, 152 US 1, 38 L.Ed.331, 337, 14 S.Ct. 548.

The failure to recognize the distinction between the public rights and the private rights, the latter being proprietary in nature, has led at least the Oregon court to rule that neither prescription nor estoppel is available to the riparian against the state in its proprietary capacity. State v. Corvallis Sand and Gravel Co., supra, p. 487.

At common law prescription ran against the King as to his proprietary interest in navigable waters. Shively, supra, at 336, Farnham, Sec. 45(b), p. 225, and Gould, Sec. 22.

Estoppel also applies against the state where it claims ownership of the bed below high water. Iowa v. Carr, 191 Fed. 257, 8th Cir. 1911.(23)

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be exercised in regulating and controlling the shores of such waters and the land under them, and if any state determines to resign to riparian proprietors rights which properly belong to it in its sovereign capacity it is not for others to raise objections." (Emphasis supplied.)

(23)"But the great weight of authority, the

Under its duty to protect navigation, and under the reservation in the admission acts of navigable rivers as public highways (discussed infra, p.) the federal government has taken over the chief responsibility of the King to protect the public rights. There is little left to the states. What responsibility is left to the state is carried out under its police powers. 78 Am.Jur.2d 521, Waters, Sec. 78, p. 526, Sec. 80 and p. 831, Sec. 390. It is an abuse of the police power for states to use their power to protect their proprietary interests as a competing claimant to property. This abuse is not expressed in court decisions but is present whenever the state seeks to extend the mantle of "sovereignty" to private rights by failing to distinguish them from public rights.

The failure of courts to recognize the distinction between the public rights and the private rights and the independence of each from the other has been a major source of confusion in the decisions dealing with the ownership of the beds of navigable rivers.

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stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while mere delay does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judiciable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances."

2.

Misapplication of the Equal Footing Doctrine.

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As each new state was admitted, its admission act contained a provision substantially as follows:

> "That Oregon be, and she is hereby, received into the Union on an equal footing with the other states in all respects whatever, ..."
>
> Oregon Admission Acts, 11 Stat. 383 (1959)

"Equality" means that the new states are not less or greater, or different in dignity or power from states previously admitted. 81 CJS 897, States, Sec. 8 citing United States v. Texas, 339 US 707, 70 S.Ct. 918, 94 L.Ed. 1221, 1227 (1950).

The "equal footing" clause refers to political rights and to sovereignty. Texas, supra at 1226.

As applied to ownership of navigable water it means equality with the 13 original states. Texas, supra at 1226.

As pointed out (supra, p.10) most of the original 13 states followed the common law and limited their claim of ownership to tidal waters. "Equal footing" as applied to states subsequently admitted would require nothing more than that the common law be followed which would limit the new states to rights in tidal rivers and would deny them any claim of proprietary ownership above salt water. This would be

especially true as applied to states such as Oregon which adopted the common law. (Supra, p. 11)

The "equal footing" doctrine has been misapapplied in that it has served as a basis for permitting newly admitted states to claim rights of ownership in navigable fresh water streams superior to those allowed the original 13 states.

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3.

Misunderstanding of the Designation in Admission Acts of Navigable Waters as Being "Common Highways and Forever Free".

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Most if not all of the admission acts contained a provision in substantially the following form:

> "... and said rivers and waters [those bordering the state], shall be common highways and forever free, as well as to the inhabitants of said State as to all of the citizens of the United States, without any tax, duty, impost, or toll therefor."(24)

The clause originated in the Ordinance of 1787 governing the Northwest Territory. Gould, Sec. 68, p. 139.

Of the provision Gould states:

"These provisions may now, perhaps, be regarded

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(24)Oregon Admission Acts, 11 Stat. 383 (1859)

> as declaratory of the modern rule that all rivers which are capable of navigation in their natural condition are subject to public use for that purpose, whether in other respects they are held to be private property or not. But at the time the Ordinance of 1787 was enacted, the question whether a fresh river is a public highway was thought to be dependent upon proof of long user by the public"

See also 78 Am.Jur.2d 530, Waters, Sec. 87.

The provision in the admission acts was a declaration of the existence of the public right of free navigation. 78 Am.Jur.2d 530, Waters, Sec. 87.

St. Paul & Pacific R.R. Co. v. Schurmeier, 7 Wall 272, 19 L.Ed. 74 (1868), in construing the meaning of an act of Congress containing the language of the Ordinance of 1787, stated:

> "Viewed in the light of these considerations, the court does not hesitate to decide, Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams shall be deemed to be, and remain public highways."

The decision is erroneous. The "public highway" status does not vest title in the state. 78 Am.Jur.2d 530, Waters, Sec. 87.

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4.

Misunderstanding by the State Courts of Their Authority to Claim or Disclaim Ownership of the Beds of Navigable Fresh Water Streams.

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If, as a multitude of authorities hold[25], each state became the owner of the land underlying navigable water within its boundaries, then there remained nothing for the state courts to decide as to the title. This has been ignored.

The courts of some states delayed extending the claim of ownership to the lands underlying navigable fresh water streams. 78 Am.Jur.2d 818, Waters, Sec. 381. The courts of many of the new states followed the common law (supra, p. 10 and following) while others ruled that the state owned between low waters (supra, p.11).

The federal courts acquiesced. Farnham, Sec. 10, p. 50.[26]

The acquiescence gave rise to the anomaly of

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[25] Farnham, Sec. 10, p. 49, citing Pollard v. Hagan, 3 How 230, 11 L.Ed. 574, and other authorities.

[26] "The extent to which the land under the waters passed to private holders of grants from the government of land on the shores is governed by the local law of the state." Citing Packer v. Bird, 137 US 661, 11 S.Ct. 210, 34 L.Ed. 819, and Port of Seattle, supra p. 22. 78 Am.Jur.2d 815, Waters, Sec. 379.

state courts summarily determining what land under water was owned by the state government and what was owned by the riparian.

The source of the power of the state court to give or withhold title to land is, at best, obscure. The federal and state courts acknowledge the power, as do the text writers, but none seems to identify the source. The power to accept or reject or to dispose of state lands should clearly be vested in the people or in the legislature or in the executive under a general grant of authority from the legislature. The state courts have established themselves as judges and juries and legislatures and executives as to the rights of private owners of property. That the right has been abused is demonstrated by the law of Washington where a riparian's rights can be denied or destroyed. Port of Seattle, supra p. 22.

Most states have adopted the common law, usually by constitutional and statutory enactments. 15A CJS 49, Common Law, Sec. 11. It is not the proper prerogative of the courts to refuse to follow the common law in determining the ownership of the beds of navigable fresh water streams. Nor is it sufficient to contend that "sovereignty" is the source of the states' power because the states have only the authority granted to them by their constitutions, all else being reserved to the people. 16 Am.Jur.2d 190, Constitutional Law, Sec. 17. With the possible exception of Washington the people of the states have not granted to their governments, and particularly to their courts, the right to declare what submerged land is public property and what submerged land is private property.

The courts, unrestricted in the exercise of a doubtful power, have deprived the riparian of his rights. The decisions may well constitute a taking of private property without compensation. Bonelli, supra, 38 L.Ed. at 540.

If in fact the ownership of the beds of navigable fresh water streams pass to the states as they gain statehood, there is nothing for the state courts to decide. If, on the other hand, title passes to the riparian, there is likewise nothing for the state courts to decide.

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5.

Misapplication of the Federal Definition of Navigability Adopted for Purposes of the Commerce Clause in the Determination of the Ownership of Beds Underlying Fresh Water Streams.

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Under the common law "navigable" referred solely to tidal waters. Farnham, Sec. 23(a), p. 104.

In time, for purposes of the application of the commerce clause and the exercise of admiralty jurisdiction the definition was expanded to include all waters which were in fact navigable. The Propeller Genesee Chief, 53 US 443, 13 L.Ed. 1058 (1851).

By 1876 the definition of navigability adopted

for purposes of the commerce clause and the admiralty jurisdiction of the federal government was used by the states as a basis for claiming ownership of the underlying beds. Barney v. City of Keokuk, 94 US 324, 24 L.Ed. 224 (1876). Smith, Sec. 41.2(B), p. 257. Barney justifies the extension of the ownership to fresh water on the basis there are numerous fresh water rivers in this country which are larger than those found in England. (24 L.Ed. at 228) No reason is given why ownership of the bed by the state is necessary.

Since Barney many states have adopted their own definition of "navigability" for purposes of enhancing their proprietary ownership. Smith, Sec. 42.2(B), p. 271. Such definitions cannot be justified on the basis of need for ownership to protect the public rights in the water.

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6.

Failure to Apply the Common Law.

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The basic fallacy which has led to the morass of law governing the ownership of the beds of navigable fresh water streams is the misconception that the state must own the bed of a stream in order to carry out its obligations to protect the public rights. The assumption results from the failure to distinguish between the public rights and the private rights. Proof that ownership of the bed is not requisite to protection of the public rights is furnished by states like Ohio and Kentucky which

border on the Ohio river the bed of which is owned by the riparians, and Illinois which borders on the Mississippi where the bed is likewise owned by the riparians, and Nebraska through which the Missouri flows the bed of which is owned by the riparians. There are many states through which our great rivers flow where the riparian owns to low water. In none of these is there a problem of the public rights being interfered with. Another example of the lack of need for the state to own the bed is in those states which claim ownership of the entire bed, such as Oregon and Florida and Iowa where, when an avulsive change takes place in a navigable river, the new bed remains in private ownership. There is no interference with the public rights because there can be none under the law.

In the early days in England where property concepts were but faintly perceived, it was thought necessary that someone should own the land under which sea-going ships navigated. The only logical person to have that ownership was the King. It was not conceivable that anyone else should have the ownership. Thus the doctrine of proprietary ownership developed. The King soon disposed of all the lands under water which could be profitably used by private individuals. Farnham, Sec. 36, p. 166.

In time the concept of a dual capacity of ownership, that in trust of the jus prublicum to protect the public and that of the proprietary ownership of the jus privatum, evolved. Farnham, Sec. 36, p. 167.

As to the beds of fresh water streams, while the matter was not resolved for some time, the King never seriously contended that he owned them.

Lord Hale resolved any dispute in his De Jure Maris. Farnham, Sec. 48, p. 239.

There is an incongruity in the law of those states which now have blended the public rights with the private rights into a concept of trust ownership. A trust requires a trustee and a beneficiary. There can be no trustee of property owned in fee. The two concepts are irreconcilable. There is a further anomaly in the concept. The riparian should be one of the beneficiaries of the trust, rather than the victim of it. He occupies a special status under the common law concept of the public rights. 78 Am. Jur.2d 830, Waters, Sec. 388.(27) The hypocrisy of the concept is manifested in states such as Oregon where the "sovereign" sells portions of the beds of navigable streams, sells the sand and gravel from them and charges for moorage rights, all the time contending that it holds the beds of its rivers in trust. None of these proprietary functions is requisite to the obligation of the state to protect the public rights. The state has surrendered most of that authority to the federal government which protects commerce and navigation.

The present diversity of law has resulted in gross inequality among private riparian owners in the different states. It has resulted in frequent

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(27)"Under the doctrine of state ownership in trust for the public, riparian proprietors are included among the cestuis que trustent, and have a special property right independent of the general public, the enjoyment of which in no wise conflicts with the exercise of legal ownership."

and complex litigation. It necessitates the determination of high water, low water, what is an accretion, what is a reliction, what is an island, does prescription apply against the state and does estoppel apply against the state. It has removed thousands of acres of land from the tax rolls. The state, as an absentee owner, is not truly concerned about the maintenance or the beauty of the exposed bed and banks of navigable rivers. It is not concerned about erosion of the bank. The rule of state ownership has made the riparian a trespasser for such simple uses as gaining access to the water when it is low. There is the very considerable question of what streams are navigable for purposes of determining ownership of the bed. There is the further complication of the effect of dams on high and low water and navigability which are to be determined when the river is in its "natural state". Bonelli, supra, 38 L.Ed. at 534, 78 Am.Jur. 2d 511, Waters, Sec. 67. There is the further problem of the ownership of the beds of streams once navigable which have ceased to be so.

There is a solution to the morass, best expressed by Farnham (after discussing the complexities of the present law):

> "It is believed by the present writer that the common law, if wisely and fearlessly applied in all cases, with such modification as changing circumstances may demand, is sufficient to solve all difficulties and to bring the entire mass of diverse law into a homogeneous code of rules, with no more uncertainty in their application than usually arises in the application of

any rule to diverse states of fact."

Farnham, Sec. 36, p. 165

Farnham then points out that it is the policy of our law to place everything in private ownership which is capable thereof. Sec. 50, p. 244.

Farnham further states:

> "The rule of the common law is definite and certain. It has solved all the problems for hundreds of years where it has been adopted; while the opposite rule is indefinite, uncertain, and the source of prolific litigation. By the common-law rule the title above tide water is in the riparian owner, subject to the public use.[28] Under that rule there is no temptation on the part of the state to interfere with the riparian rights of the abutting owner. The laws of alluvion and accretion have their full force and application; if the river changes or leaves its bed there is no uncertainty as to who owns the abandoned land; the public knows its rights and their limitations and there is little reason for any one to exceed his rights. This also disposes of the whole title, leaving no remnant to create uncertainty or disputes."

Farnham, Sec. 50, p. 245

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[28] The Admission Acts, supra p. 27, also insure the public right of navigation. Smith, Sec. 35.2(C), p. 183.

As noted in Gavit v. Chambers, 3 Ohio 496, cited and quoted by Farnham at page 245:

> "If the opposite rule [contrary to the common law] is adopted, at what point does the right of the owner terminate? On the top or at the bottom of the bank? At high or low water mark? Does the boundary recede and advance with the water? Or is it stationary at some point? And where is that point? Who gains by alluvion? Who loses by the direptions of the stream? No satisfactory rules can be laid down in answer to those questions, if the common law doctrine is departed from. It cannot be doubted that if the beds of rivers treated as navigable are to be regarded as unappropriated territory, a door is opened for incalculable mischiefs."

The common law principle is easy of application. The federal and state governments would continue to be charged with their duty of protecting the public rights of navigation, fishery, recreation, and so forth. Thousands of acres of land would be placed on the tax rolls. Litigation would be minimized. The states would no longer be competing with riparians for property to be placed on the market, which is not a proper function of state government. Riparians would be protected in their proper rights.

SUMMARY OF PROPOSITION I

Bonelli, supra, 38 L.Ed. at 539, recognized the importance of protecting the riparian. The case also stands as precedent against giving the

state a windfall of unnecessary property, 38 L.Ed. at 540. The decision makes clear that the rights of the state in the river bed are limited, 38 L.Ed. at 540, and that the "nature and extent" of the states' title is to be determined under federal law.

For universal law to be successful it must be simple. It must be based on experience and it should have ample reliable precedent. By requiring the states to adhere to the common law all of these requirements are met within the limitations of our judicial system.

PROPOSITION NO. II

IN THE ABSENCE OF PLEADING AND PROOF THAT THE PUBLIC RIGHTS OF NAVIGATION, FISHERY AND RELATED USES ARE BEING IMPAIRED OR INTERFERED WITH THE STATE OF OREGON CANNOT RECOVER DAMAGES IN AN EJECTMENT ACTION FOR REMOVAL OF SAND AND GRAVEL FROM THE BED OF A NAVIGABLE FRESH WATER STREAM WHERE ITS CLAIM OF OWNERSHIP IS BASED ON SOVEREIGNTY RATHER THAN GRANT.

ARGUMENT

The Argument under Proposition I is incorporated by reference.

At common law the riparian could:

> "...make such use of the stone and sand in the bed of the stream as he can make without injury to other individuals or the public."
>
> Farnham, Sec. 473, p. 1602

Mississippi, which follows the rule that the state owns the entire bed of navigable fresh water streams (supra, p. 5), follows the common law. Archer v. Board of Commissioners, 158 Miss 57, 130 So. 55, 56 (1930).

Bonelli, supra, declared: "The State's title is to the 'river bed as a bed'." (38 L.Ed. at 536) citing State v. Gill, 259 Ala 177, 181, 66 So.2d 141, 145 (1953). In Gill the Alabama court stated of the state's ownership of the bed of a navigable fresh water stream:

> "...is a title to the bed as a bed and not the individual grains of sand or lumps of mud that constitute the land making up the bed."

State is seeking the sand and gravel, not because it has any use for it, but because it wishes to generate revenue for the state treasury. The production of revenue is not sufficient to give the state title to the sand and gravel. Farnham, Sec. 50, p. 244[29], Port of St. Helens v. Oregon, Civil

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[29]"There is, undoubtedly, a perceptible advantage in owning land adjoining a navigable body of water. So plainly is this true that in all new countries settlers locate upon such waters before they do further inland, and the course of commercial activities follows very closely the lines of navigable waters. To deprive such a settler of his advantage is to take from him a portion of the value of his property. In addition to this there is a

No. 74-572 (D. Or. August 28, 1975, modified October 2, 1975), p. 47 addendum to this brief.[30]

SUMMARY OF PROPOSITION II

The state does not own the beds of navigable fresh water streams as set out under Proposition I.

If it does own the beds, the interest is limited, Bonelli, supra, 38 L.Ed. at 540, and does not include the individual grains of sand or gravel.

Corvallis Sand removed material from the bed of the river under permits issued by the Corps. (Exs. 280-307.) The permits are incontrovertible evidence that the public right of navigation was not being interfered with. State did not plead nor offer any evidence showing that Corvallis Sand's operations

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value in the use of the bed and shores of the water which can be availed of in subordination to the public right of navigation, and which is very material. A forceful illustration of this is the fact that in almost every instance when a state has established its title as against the riparian owner it has immediately proceeded to grant the bed and shores, or a portion thereof, thereby making a revenue for its own use. Furthermore, it is the policy of our law to place everything in private ownership which is capable thereof."

[30] This case is as yet unreported. It is set forth in its entirety as an addendum to this brief, commencing p. 47:

"The State argues that it needs Dibblee Point to provide public recreation, to provide access to the River, to protect wildlife, to permit

in any way interfered with any other aspect of the public rights.

The issue is whether or not the state can claim ownership of sand and gravel in order to make a profit. The authorities are overwhelming against such a position.

CONCLUSION

As late as 1860 the law was settled that the riparian owned the beds of fresh water streams. This court in deciding the ownership of accreted land below high water on the Mississippi river in Missouri stated:

> "We think this [that the riparian title went to the middle thread of the stream], as a general rule, too well settled, as part of the American and English law of property, to be open to discussion; ... The doctrine that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark, has no application in this case;

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development of water-dependent commerce and industry, and to provide revenue for the common school fund. The State introduced no evidence to prove these interests nor did it introduce any evidence that it needs title for any reason other than to produce State income. The State has already sold part of Dibblee Point to the Port and it will probably sell the remainder to the Port if it acquires title. The production of revenue is not an interest sufficient to vest title in the State."

nor does the size of the river alter the rule. To hold that it did, would be dangerous tampering with riparian rights, involving litigation concerning the size of rivers as a matter of fact, rather than proceeding on established principles of law."(31)(32)

Jones v. Soulard, 24 How 41, 16 L.Ed. 604, 609 (1860)

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(31)The syllabus of the defendant in error contains the following pertinent analysis:

"By reference to the decisions of the Supreme Court of the United States since Pollard v. Hagan, it will be seen that while the doctrine of that case has been repeatedly reaffirmed, scrupulous care has been used to restate that doctrine as it was in the first place laid down, and to limit the decision by the circumstances under which it was made, viz: that land flowed by the sea at ordinary high tide, if not previously disposed of by the United States, became the property of the State on its admission to the Union. This careful reference to tide water [9 How. 471; 59 U.S. (18 How.) 71-74], and the distinction taken as lately as 13 How., 416,422, between fresh-water streams and the arms of the sea, properly so called, are abundantly sufficient to show, if illustration were needed, the accuracy with which the doctrine declared in Pollard's Lessee v. Hagan, was adapted to the particular facts of that case, and how little it was the purpose of this court to leave any one at liberty, first to misconstrue and then misapply the decision in that cause."

(32)This court ignored the state law of Missouri that the riparian's ownership extends to low water,

That opinion is based on sound principles of property law. Over the years those principles have been misunderstood and misapplied and have been cut into by such irrelevancies as "equal footing", "public highway", and "navigable" until today no other question in the law has evoked such confusing and conflicting rulings.

Through all of it, the riparian has been the victim. He has been pushed into a unique status in the law where rights which the law had historically declared to be his have been arbitrarily cut into or emasculated by the state courts. No voice seems to have been raised to defend the riparian on the ground his property rights were being taken without just compensation. There is no parallel in the law where vested property rights have been so subjected to the whims of the courts. With all due respect, those courts too often have been motivated by the desire to put revenue into the state treasuries. To accomplish this, precedents have been ignored or misinterpreted, historical facts distorted or misunderstood.

In Barney (supra 24 L.Ed. at 228) this court stated that the resolution of the rules of property "properly belongs to the states by their inherent sovereignty." That decision was rendered exactly 100 years ago. In the meantime the states have continued to pursue their quest for more revenues for the state treasury, have further complicated the legal problems involved in this important area, and have failed to clear up the confusion.

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and declared as a matter of federal common law that the ownership extended to the thread of the stream.

Due process is an over-riding issue:

"Finally, recognition of the State's claim to the subject land would raise a serious constitutional issue as to whether the State's assertion of title is a taking without compensation, a question which we find unnecessary to decide on our view of the case. As Mr. Justice Stewart warned in Hughes v. Washington, 389 US 290, 298, 19 L Ed 2d 530, 88 S Ct 438 (1967) (concurring opinion):

> 'Although the state made no attempt to take accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private property into public property without paying for the privilege of doing so. The due process clause of the 14th Amendment forbids such confiscation by the state no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate.'"

Bonelli, supra, 38 L.Ed. at 540, 541

For two centuries state courts, with the approval of this court, have in many jurisdictions retroactively severed from the riparian the rights of property which are properly his. It is illusory to believe that those same courts will now restore riparian rights.

It is correct to say that "...federal law must be applied with a view towards the limited nature of

the sovereign's rights in the river bed, ..." Bonelli, supra, 38 L.Ed. at 540. The limited right is the jus publicum for the protection of the public rights of navigation and related uses. The sovereign can maintain ejectment to remove a nuisance which interferes with navigation. It can protect the public right to use the river for recreational purposes. But, despite the parroting of misunderstandings as to "equal footing", "public highways" and "navigable" by the law(33), the sovereign cannot claim any proprietary interest in the beds of fresh water streams.

The only remedy is for the court to restore the rights of the riparian through the application of tested and proved principles of property and constitutional law.

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There is no authority to support a contention by the state that it needs the sand and gravel. Its objective is to obtain ownership of the sand and gravel so that it can sell it.

Unless the principle of separation of the public rights from the private rights is to be abandoned, it can only be concluded that the removal of sand and gravel is in no way connected with the public rights when such removal is authorized by the Corps. The protection of the public rights does not

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(33) For an anlysis of the inconsistencies of court decisions see Farnham, Sec. 50, pp. 246 through 249.

require or justify the granting of the ownership of sand and gravel to the state. Bonelli, supra, 38 L.Ed. at 539-41, recognized the importance of riparianess. It also recognized that the state owns the bed "as a bed" and cited Gill, supra, which held unequivocally that the state does not own the "individual grains of sand or lumps of mud".

On the basis of precedent which makes sense it should be declared that the state does not own the sand and gravel in the bed of a navigable fresh water stream and that it cannot recover damages therefor.

RELIEF REQUESTED

Corvallis Sand should be awarded all of the disputed property free and clear of any claim of State. The judgment awarding damages to State should be set aside.

Respectfully submitted,

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Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SOLOMON, Judge:

The Port of St. Helens (Port) and the State of Oregon (State) each claim ownership of Slaughter's Bar, a 160-acre tract of land along the Oregon side of the Columbia River (Columbia or River). The disputed land is part of a larger tract known as Dibblee Point, which developed on the bed of the Columbia as a result of navigation projects of the United States Army Corps of Engineers (Corps). The Port asserts rights as owner, and former owner, of the uplands to which the disputed land attached. The State asserts ownership as titleholder to the bed of the Columbia.

The Columbia River is a navigable waterway of the United States. Since 1877, the Corps has engaged in a program to maintain the navigable capacity of Slaughter's Bar. At first the Corps periodically dredged the existing navigation channel, which was located on the Washington side of the Bar. This was not effective because of the configuration of the River. The Columbia at Slaughter's Bar is wider than the River upstream. As the River entered the Bar, it slowed down and precipitated waterborne silt.

To remedy this problem, the Corps proposed to artificially narrow the River by the construction of pile dikes.[1/] The River, once constricted,

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[1/] Pike dikes generally consist of two rows of

would run faster and produce a self-scouring channel. The Corps also proposed to relocate the navigation channel to the main stream of the River, nearer to the Oregon shore.

Congress approved the Corps' proposal in 1912. From 1917 to 1925, five pile dikes were built which extended perpendicular to the Oregon shore. In 1960, four of the five dikes were extended.

The pile dikes did not completely eliminate the need to dredge the channel. Initially, the dredge spoils from the dredging were deposited near the outboard end of the dikes. This increased the efficiency of the dikes. Later, spoils were deposited closer to the shore.

Gradually, the accumulated dredge spoils and the silt formed a land mass on the bed of the River. By 1940, areas of the mass near the shore were exposed, and by 1973 a 290-acre tract of dry land approximately two miles long and one-quarter mile wide had developed along the Oregon shore of

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timber pilings driven into the bed of a waterway and extending perpendicular to the shoreline. Stone is usually placed along the base of the dike. A pile dike will reduce the velocity of the flow of the river through the dike, while increasing the flow of the river channelward of the dike. As the river passes through the dike, riverborne sediment deposits on the downstream side of the dike. The increased flow and volume through the navigation channel which is caused by the dike reduces or eliminates the deposit of sediment in the channel.

Slaughter's Bar. This tract is Dibblee Point. The Port purchased approximately 130 acres of Dibblee Point from the State. The remaining 160 acres are in controversy.

Before 1968, the Port owned all of the uplands to which Dibblee Point attached. In 1968, the Port sold some of this land to Columbia County, but reserved to itself all rights to that part of Dibblee Point which abutted the conveyed tract. The Port now asserts ownership of Dibblee Point as owner, and former owner with reserved rights, of the upland to which Dibblee Point attached. The Port wants to use the land for commercial purposes.

The State contends that it owns Dibblee Point as former owner of that part of the bed of the Columbia on which the land developed. Although the State argues that ownership of Dibblee Point is necessary to provide public recreation, protect wildlife, provide access to the River, permit development of water-dependent commerce, and provide revenue, it does not object to the Port's development of Dibblee Point as a commercial facility.[2/]

[2/] Pursuant to ORS 274.925(1), the Port may purchase Dibblee Point from the State, and the State must sell Dibblee Point to the Port if the Port elects to buy the land within one year after formal notification by the State that the land has formed and if the State does not find, after a hearing, that the land is necessary for recreation, conservation of fish and wildlife, or the development of navigation facilities. ORS 274.940. The record does not show that the notice required by ORS 274.925(1)

The facts in this case are similar to those in Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973). There the Bonelli Cattle Company purchased from the Santa Fe Pacific Railroad a large tract of land on the east shore of the Colorado River. Gradually, the River moved eastward until only a small portion of the original tract remained. In 1955, the plaintiff purchased all of the original tract. Four years later, the federal government deepened and rechanneled the Colorado River. As a result, the stream of the River was confined to a substantially reduced portion of the Bonelli property, and new land on both sides of the River emerged. Bonelli claimed title to the new land on the east side of the River. Even though Arizona did not participate in the project, it, too, claimed title to this land.

The new land in Bonelli was created in much the same way that Dibblee Point was created. The land was formed in part by the precipitation of waterborne sediment and in part by the deposit of dredge spoils, all resulting from the project.[3/] The only

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has been given or that a finding under ORS 274.940 has been made.

The manager of the Port of St. Helens testified that since 1969 the parties have agreed that the 160 acres in dispute should be developed for industrial and commercial purposes.

[3/] Although the Supreme Court opinion does not set forth the manner in which the land was created, the Supreme Court referred with approval to an Arizona Law Review article which analyzed the Arizona Supreme Court's opinion in Bonelli. The author of

factual distinction between the cases is that the new land in Bonelli was reemerged land which was formerly held by Bonelli's grantor, then submerged, and then again exposed. The Supreme Court did not consider this fact to be material to its decision. 414 U.S. at 330 n. 27.

The State argues that Dibblee Point, unlike the land in Bonelli, developed as an island or an island group. The State asserts that, under common law, title to islands formed by accretion rests in the State and that accretions to islands, even if they attach to the land of a riparian, also belong to the State. The evidence shows that Dibblee Point, as it evolved, was not independent from the shoreline. It was never surrounded on all sides by a channel of the River. The portions of the mass which did emerge offshore were not permanent, had little vegetation, and generally were not elevated above ordinary high water. In my view, there is no

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the article stated:

> "The dredging process undoubtedly affected the flow and currents of the river and produced three separate effects . . . . The dredging probably raised a great deal of sediment facilitating local alluvion deposition contemporaneously with the reliction of the waters caused by the deepening and narrowing of the channel. Third, spoil dredged from the river bed was deposited toward the banks of the river adding appreciably to the land accumulation." Lundquist, Artificial Additions to Riparian Land: Extending the Doctrine of Accretion. 14 Ariz. L.Rev. 315, 333 (1972)

merit to the State's contention. See McBride v. Steinweden, 72 Kan. 508, 83 Pac. 822 (1906).

The Court in Bonelli held that federal common law determines ownership. That law requires an analysis of the competing interests of the riparian and the state "in light of the rationales for the federal common-law doctrines of accretion and avulsion," and in light of the "limited nature of the sovereign's rights in the river bed." 414 U.S. at 328. If "the land was exposed as part of a navigational or related public project of which it was a necessary and integral part", the new land is treated as an avulsion and title vests in the state. 414 U.S. at 323, 328. If it was not, then it is treated as an accretion, and title vests in the riparian. 414 U.S. at 328.

The Bonelli Court awarded title to the riparian owner on two grounds. First, there was "no showing that the rechannelization project was undertaken to give [Arizona] title to the [new land] for the protection of navigation or related public goals." 414 U.S. at 323. Instead, the land developed incidentally to a project in which the State did not participate. It was a "windfall". 414 U.S. at 322-23. Second, Arizona did not assert any public need for the new land. 414 U.S. at 323 n.15, 331.

The Court did not decide what interests Arizona could have successfully advanced in asserting title. 414 U.S. at 323 n. 15. However, in dicta the Court said that the state may prevail only when ownership

of new land is necessary to protect fishing, navigation and commerce in the river.[4/] See State Land Board v. Corvallis Sand & Gravel, 99 Or. Adv. Sh. 1532, 1541 (Ct. of App. 1974), aff'd, ___ Or. ___ (1975).

Here, as in Bonelli, the land developed incidentally to the primary project. There is no evidence that the State purposely created Dibblee Point with the intent that it would own Dibblee Point to promote any particular interest. In fact, there was no showing that the State participated in the project.

The State argues that it needs Dibblee Point to provide public recreation, to provide access to the River, to protect wildlife, to permit development of water-dependent commerce and industry, and to provide revenue for the common school fund. The State introduced no evidence to prove these interests nor

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4/". . . Accordingly, where land cast up in the Federal Government's exercise of the servitude is not related to furthering the navigational or related public interests, the accretion doctrine should provide a disposition of the land as between the riparian owner and the State. See Michaelson v. Silver Beach Assn., 342 Mass. 251, 173 N.E.2d 273 (1961)

". . . [L]and surfaced in the course of such governmental activity should inure to the riparian owner where not necessary to the navigational project or its purpose." 414 U.S. at 329.

See also 414 U.S. at 323, 328.

did it introduce any evidence that it needs title for any reason other than to produce State income. The State has already sold part of Dibblee Point to the Port and it will probably sell the remainder to the Port if it acquires title. The production of revenue is not an interest sufficient to vest title in the State.

This opinion shall constitute findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a)

Plaintiff is directed to prepare a judgment vesting title to the disputed land in the Port.

No costs.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-577

CORVALLIS SAND AND GRAVEL COMPANY,
an Oregon corporation,

Petitioner,

vs.

STATE OF OREGON, Acting by and through the State Land Board,

Respondent.

RESPONDENT'S BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-577

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Petitioner,

v.

STATE OF OREGON, Acting by and through the State Land Board,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

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RESPONDENT'S BRIEF

Respondent State of Oregon herewith submits its brief on the merits in answer to the brief of the petitioner.

OPINIONS BELOW

The trial court's memorandum opinion is reprinted in the appendix at 167.

The opinion of the Oregon Court of Appeals affirming in part and reversing in part the judgment of the trial court is reported at 18 Or App 524, 526 P2d 469 (1974) and is reprinted in the Appendix at 195.

The opinion of the Oregon Supreme Court is re-reported at 75 Adv Sh 2068, 272 Or 545, 536 P2d 517 (1975) and is reprinted in the Appendix at 233.

The clarifying opinion of the Oregon Supreme Court denying the Petitions for Rehearing is reported at 75 Adv Sh 2562, 272 Or 545, 538 P2d 70 (1975) and is reprinted in the Appendix at 240.

JURISDICTION

On June 12, 1975, the Oregon Supreme Court entered its opinion affirming the judgment of the Oregon Court of Appeals as modified. (A 233).

On July 17, 1975, the Oregon Supreme Court, in a clarifying opinion, denied timely petitions for rehearing filed by both parties. (A 240).

This petition for a writ of certiorari was filed on October 14, 1975, which was within 90 days of that date, pursuant to Rule 22(3) and the provisions of 28 USC §1257(3) under which the jurisdiction of this Court is invoked.

This Court granted certiorari on January 12, 1976 in accordance with the request of both parties.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 Stat 383 provides that:

> "That Oregon be, and she is hereby, received into the Union on an Equal footing with the other States in all respects whatever, with the following boundaries: . . ."

Section 3(a), (b) and (c) of the Submerged Lands Act . . . 43 USC §1311(a), (b) and (c) (1970 ed) is also involved and is set forth as an Appendix hereto.

As of the date of the filing of the state's first Amended Complaint in ejectment (A 5), the following statutes and constitutional provisions were in effect and dealt with the state's ownership and management of lands under navigable waters. Or Const, art VIII, §5(2); ORS 273.031, 273.041, 274.025(1), 274.040(1), 274.530(1), 274.560 and 274.915.* These provisions are set forth as an Appendix hereto.

In addition to these statutes the following statutes authorized the state to bring an ejectment action for damages to recover possession of the bed of a navigable river: ORS 105.005, 105.010, 105.025(1), 105.030, 273.-225, 273.231, and 273.235.*

QUESTION PRESENTED FOR REVIEW

Does the State of Oregon have a sufficient proprietary interest in the soils underlying its navigable waters so as to support a complaint and judgment of ejectment with damages for the reasonable value of the use of portions of the bed of a navigable river by the defendant even though there are no allegations in the complaint that the defendant's possession of the riverbed has interfered with public navigation, commerce and fishing?

STATEMENT OF THE CASE

The Willamette River is a navigable river within the state of Oregon. In 1859, Oregon was admitted into the Union "on an [e]qual footing with the other states in

* Citations to ORS Chapter 273 are to the 1974 Replacement Part. Citations to ORS Chapter 274 are to the 1973 Replacement Part.

all respects whatever . . . ." 11 Stat 383. By virtue of that statute which incorporated the equal footing doctrine, Oregon acquired title to those lands under navigable waters within the state. *See, Bonelli Cattle Co. v. Arizona,* 414 US 313, 318 (1973); *Shively v. Bowlby,* 152 US 1, 26 (1893); *Mumford v. Wardwell,* 73 US (6 Wall) 423, 436 (1867); *Pollard's Lessee v. Hagan,* 44 US (3 How) 238, 248, 250, 257-258, 259-260 (1845); *Martin v. Waddell,* 41 US (16 Pet) 234, 263 (1842). Therefore, by virtue of its sovereignty, Oregon acquired at statehood the title to the beds of all rivers then navigable within its boundaries. *United States v. Oregon,* 295 US 1, 14 (1935).

The State Land Board is the policy making body for the Division of State Lands and consists of the Governor, Secretary of State and State Treasurer. ORS 273.031 and 273.041.[1] Under Article VIII, Section 5(2) of the Oregon Constitution and ORS 273.031 and 273.041, the State Land Board is required through the Division of State Lands to manage among other lands the lands under navigable waters within the state of Oregon "with the object of obtaining the greatest benefit for the people of this state consistent with the conservation of this resource under sound techniques of land management." Or Const, art VIII, §5(2). By statute, title to

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[1] These statutes and those hereinafter cited and Or Const, art VIII, §5(2) are set out in the Appendix hereto unless otherwise noted.

these lands are declared to be in the state of Oregon. ORS 274.025(1).

Pursuant to its constitutional and statutory duties and responsibilities, the State Land Board on December 23, 1969 filed a statutory ejectment action in the Circuit Court for Benton County in the form of a first amended complaint (A 5) to recover the possession of various parcels of lands under the waters of the Willamette River and also to recover damages for the reasonable value of their use by the defendant.

The defendant in that case is the Corvallis Sand and Gravel Company, an Oregon corporation, which had been digging in the disputed portion of the riverbed for some 40 to 50 years without a lease from the State of Oregon.

The state's complaint (A 5) alleged that by virtue of its sovereignty the state was "the owner in fee simple of and entitled to the immediate possession of" the parcels in question and further alleged that the "[d]efendant does now wrongfully withhold the possession of the aforedescribed real property from the plaintiff" and for various periods of time "immediately prior to the filing of" the original or amended complaint "has wrongfully and continuously withheld the aforesaid described real property from the plaintiff."

In the damages portion of the complaint the state alleged the "reasonable value of the use of said premises" for each year the defendant was in possession. (A 20).

The damages claimed included damages accruing from six years prior to the filing of the original or amended complaint and during the pendency of the action. (A 17, 20).

The complaint was authorized by the statutory ejectment provisions of ORS 105.005, 105.010, 105.025(1) and 105.030 and by the statutes requiring the payment of a royalty for the removal by any person of material from the beds of navigable streams. ORS 273.225, 273.231, 273.235, 274.530, 274.560.

In its answer, the corporation denied the state's ownership of the various parcels of riverbed (excepting only the major portion of parcel 3 which was under lease from the state) and admitted it had withheld possession of the real property as alleged but denied that such action was wrongful. (A 28, 34).

At the trial the State proved the reasonable value of the use of its property by the defendant by showing the amount of material removed therefrom each year by the defendant and the market value per cubic yard of that material. (Tr 791-800, 809-811; Tr 717, 718, 722-724; Tr 252, 729-731; Tr 169, 189, 190, 192-193, 195; Tr 571-575; Ex 4).

With exceptions not here material the trial court ruled in favor of the ownership of the state of all the parcels claimed except for parcels 2A, 2B and 2C and a portion of parcel 3 which the trial court held were part of Fischer Cut and avulsive and, therefore, belonged to

the corporation (A 170-172). The court awarded the state $82,500 in damages for the reasonable value of the use of parcels 1, 3, 4, 5 and 6. (A 186-187, 191-194).

Both parties appealed. The Oregon Court of Appeals affirmed but eliminated the damages for parcel 3 in the amount of $7,000. (A 195, 223-224, 231). On review, the Oregon Supreme Court affirmed the Court of Appeals on the issue of avulsion but modified the court's holding as to the length of the avulsive area and the damages to the extent they were affected by the revised length of the avulsion. (A 231, 240).

In Case No. 75-567, this Court granted certiorari in response to the state's petition asserting that the Oregon courts had incorrectly applied the federal law of avulsion and the federal law of ownership of navigable riverbeds in the states as enunciated in *Bonelli Cattle Co. v. Arizona, supra.*

In the present case, No. 75-577, this Court granted certiorari in response to the defendant's petition which asserted in effect that the states have no proprietary interest in their navigable riverbeds and, therefore, Oregon was entitled to no damages in this case. The state, while opposing in principle the petition of the corporation, urged the Court to take jurisdiction of the petition to put to rest once and for all the questions raised by the language of this Court in *Bonelli Cattle Co. v. Arizona, supra.* (State's brief in opposition to Petition for Certiorari at 1).

ARGUMENT

BY VIRTUE OF ITS SOVEREIGNTY THE STATE OF OREGON HAS FULL AND COMPLETE TITLE TO THE SOILS UNDER ITS NAVIGABLE RIVERS WHICH TITLE FOLLOWS THE RIVERS IN THEIR VARIOUS MOVEMENTS.

In *Bonelli Cattle Co. v. Arizona, supra,* this Court held that the State of Arizona did not have title to a portion of the bed of the Colorado River from which the river had receded because of deepening of the channel by the federal government. In reaching that result the Court used language which defendant contends indicates that the state's title to the bed is a limited title solely for the protection of navigation and related purposes and that under such title the state does not have a proprietary interest in its soil under navigable waters. Accordingly, the state cannot lease such soil for the various commercial purposes the state engages in.[2]

Oregon submits that, in view of the prior decisions of this Court, the correct interpretation of the *Bonelli* de-

[2] Defendant also erroneously relies on *State v. Gill,* 259 Ala 177, 183, 66 S2d 141, 145 (1953) for the proposition that the state has no proprietary interest in the soils under its navigable waters. (Pet Br at 39). That case held that the riparian or littoral owner rather than the state had title to accretions artificially created by dredge spoil dredged by the United States from Mobile Bay and deposited by the United States on the shore of such bay. Such case does not deal with the ownership of the materials of the bed itself while in place nor with whether the state has a proprietary interest in the bed and therefore is not relevant to our case. In any event, *Wear v. Kansas,* 245 US 154 158-159 (1917) clearly holds that the ownership of sand and gravel in the bed of a navigable river is in the state and it can charge a royalty for their removal by private persons.

cision is that the state's title to the waters and underlying soils of the Willamette River has followed the river in its various movements since 1859 when Oregon became a state.[1]

This Court has clearly stated on many occasions throughout its history that each state has complete ownership of its navigable waters and the lands under them and may make such disposition of those lands as it sees fit, subject only to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations.

The root authority for this proposition is *Martin v. Waddell*, 41 US (16 Pet) 234 (1842). The dispute in that case concerned the ownership of 100 acres of soil under navigable waters in New Jersey which contained a valuable oyster fishery. Plaintiff traced its title to a grant in 1834 from the 24 proprietors of East New Jer-

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[1] What the Oregon courts have said, in effect, by virtue of *Bonelli* is that not only does the state not have title to avulsively abandoned riverbeds, but also that whether or not the state has title to the bed of the Willamette River *as it flows today*, depends on whether the 117-year history of the river in a particular location is free of "avulsive" changes. (A 206-208). For the reasons noted in the state's brief on the merits, at 16-19, in Case No. 75-567, Oregon objects because applying a boundary principle of avulsion to qualify state ownership of and full sovereignty over its navigable riverbeds is productive of uncertainty, complicated litigation and a pattern of public and private ownership in the navigable riverbeds. This can only result in conflict destructive of full public enjoyment of the state's navigable watercourses. If a rule of avulsion must be applied, it should only be in rare instances. Oregon's brief in Case No. 75-567 points out there was no avulsion in this case (20-24) and suggests the limited circumstances in which it might be appropriate to find an avulsion. (25-27).

sey, who were the grantees of the Duke of York and he in turn the grantee of the Crown. The defendants claimed an exclusive right to take oysters in the same place by virtue of statutory grants in 1824 from the State of New Jersey which had succeeded to the interest of the Colony after the revolution. Those statutes gave the grantee an exclusive right to plant and grow oysters subject to a rental therefor being paid the state. 41 US (16 Pet) at 243. In 1702 the 24 proprietors had surrendered all their powers of government back to the Crown, but reserved to themselves their right of private property. Thus the basic issue in the case was whether the Crown's grant to the Duke of York purported to sever from the grant of governmental powers to the Duke a private proprietary interest in the soils under navigable waters which the Duke could dispose of as he wished.

The Court concluded that the title the Duke received from the Crown was not private property but was linked to the sovereign prerogative powers of government granted to the Duke. The grantees of the Duke of York, the 24 proprietors, received this identical interest, and when they surrendered their powers of government back to the crown, those governmental powers carried with them by necessary implication title to the soil and waters in the absence of clear language showing a contrary intent. The Court therefore concluded that the proprietors had no title to give to the plaintiff.

In reaching these conclusions the Court took note of

the contention that the King, since Magna Charta, did not have the power to grant an exclusive right of fishery in navigable waters. The contention apparently had been made by the defendants (plaintiffs in error) to support their position that the Crown's grant to the Duke of York did not purport to be of private property because the Crown did not have this power and, therefore, there was no power included in the grant to convey an exclusive fishery. Defendants apparently had also argued that there was no similar limitation on the State of New Jersey. *See* 41 US (16 Pet) at 254, 257-258. The Court, while noting the apparent correctness of the argument concerning the power of the Crown to grant an exclusive fishery in navigable waters declared that it did not need to deal with that issue saying in part:

> ". . . And we the more willing forbear to express an opinion on this subject, because it has ceased to be a matter of much interest in the United States. For when the revolution took place, *the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use,* subject only to the rights since surrendered by the constitution to the general government. *A grant made by their authority must, therefore, manifestly be tried and determined by different principles from those which apply to grants of the British Crown,* when the title is held by a single individual, in trust for the whole nation." 41 US at 263. (Emphasis supplied).

The import of the above quotation is that unlike the British Crown—which was subject to the limitation that it could not freely dispose of a proprietary interest in

navigable waters and underlying soils and, if it did so, such grant would be strictly construed against the grantee—the people of each state acquired an absolute title to the navigable waters and underlying soils for their own common use which title the state on their behalf could dispose of as it might choose subject only to the navigational servitude in aid of commerce. Thus the Court in effect sustained the validity of the New Jersey statute which for a stipulated rental had authorized the granting of an exclusive right of fishery to the defendants. *See* 41 US(16 Pet) at 243.

In short, the people in this country were not to be "governed by the common law of England as it prevailed in the Colonies before the Revolution, but as modified by our own institutions." *Pollard's Lessee v. Hagan, supra* 44 US (3 How) at 258 (1845).

The concept of an absolute title in the state with full power of disposition subject only to the navigational servitude in the interest of the Congressional power to regulate commerce has been reiterated by this Court many times since *Martin v. Waddell. United States v. Holt Bank,* 270 US 49, 54-55 (1926) (non-tidal waters; drainage of navigable lake by state, with title to bed passing to abutting owners; "lands underlying navigable waters within a State belong to the State in its sovereign capacity and may be used of and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purpose of navigation in com-

merce among the states. . . ."); *Port of Seattle v. Oregon & W. R. R.*, 255 US 56, 63 (1921) (tidal waters; "[t]he character of the State's ownership in the lands and in the waters is the full proprietary right. The State being the absolute owner of the tidelands and of the waters over them, is free in conveying tidelands either to grant with them rights in the adjoining water area or to completely withhold such rights."); *Scott v. Lattig*, 227 US 229, 242-243 (1913) (non-tidal waters; "lands underlying navigable waters within the several states belong to the respective states in virtue of their sovereignty and may be used of and disposed of as they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control navigation"); *Shively v. Bowlby, supra*, 152 US at 57-58. (State statute disposing of tidelands and permitting owner to construct wharf not invalid as against upland owner holding under federal donation land claim patent bounded by the Columbia River); *Illinois Central Railroad v. Illinois*, 146 US 387, 435, 453 (1892) (State has power to dispose of parcel under non-tidal waters if no impairment of public interest); *Hardin v. Jordan*, 140 US 371, 381-382 (1891) (Non-tidal waters; state may dispose of usufruct of lands under navigable waters and may reclaim submerged flats for public or private purposes other than navigation and commerce); *Barney v. Keokuk*, 94 US 324, 337-338 (1876) (Non-tidal waters); *Weber v. Harbor Commissioners*, 85 US 57, 65-66 (1873)

(Tidal waters); *Mumford v. Wardwell, supra,* 73 US (6 Wall) at 436 (Tidal waters) and *Den v. Jersey Company,* 56 US (15 How) 451, 458 (1853) (Title to reclaimed tidal lot granted by legislature sustained).

As the above authorities indicate, a state's title to the soils of a navigable river is unaffected by whether the waters are tidal or non-tidal. *Barney v. Keokuk, supra,* 94 US at 338. Speaking of the confusion in this country of navigable with tidal water the court declared:

> ". . . It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. *Whether, as rules of property, it would now be safe to change these doctrines* where they have been applied, as before remarked, is for the several States themselves to determine. *If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.* In our view of the subject, the correct principles were laid down in *Martin v. Waddell,* [supra], *Pollard's Lessee v. Hagan,* [supra] and *Goodtitle v. Kibbe,* 9 How. 471. *These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigational waters.* And since this court, in the case of *The Genesee Chief* 12 [How] 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, *there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their in-*

herent sovereignty, . . ." 94 US at 338. (Emphasis supplied).

Barney v. Keokuk, supra, not only decided that the states' title in the soils of navigable waters is unaffected by whether the waters are tidal or not but also that it is for the states to determine what interests they shall accord to the riparian owner in the soils underlying navigable waters. Both these principles have been affirmed repeatedly by this court. *Hardin v. Jordan, supra*, 140 US at 382; *Illinois Central Railroad v. Illinois, supra*, 146 US at 435-436, 452; *Shively v. Bowlby, supra*, 152 US at 57-58; *Scott v. Lattig, supra*, 227 US at 242-243; *Donnelly v. United States*, 228 US 243, 261-263 (1913).

The title to the soils under navigable waters must either be in the United States, the state or the riparian owner. The United States has no title once the "federal action in admitting a state into the Union" is completed. This was pointed out in a case which involved the State of Oregon itself. *United States v. Oregon, supra*, 295 US at 14; 43 USC §1311(a), (b) and (c). Thus title to the beds of navigable rivers within a state must either be in the state "in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether one or the other is a question of local law." *United States v. Chandler-Dunbar Co.*, 229 US 53, 60 (1913).[4] And if

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[4] Under Oregon law, the state owns the beds of navigable rivers between high water marks and the upland or abutting riparian owners have no title to the beds of such river unless and

(Continued on page 16)

the state has the right to decide what interest it shall accord to the riparian proprietor in the soils under navigable waters, then clearly, the State *must* have the complete title in the first instance.

Because of the foregoing pronouncements by this Court, the states had assumed that they had full and complete ownership of all lands under navigable waters within their boundaries with the right to lease the beds thereof for the extraction of oil, gas and other minerals. *See*, for example, *State v. Longyear Holding Co.*, 224 Minn 451, 29 NW2d 657, 670-672 (1947), *cert denied* 336 US 948 (1948) (State mining lease for disposal of iron ore); *State v. McVey*, 168 Or 337, 343-345, 121 P2d 461, 123 P2d 181 (1942) (State gravel royalties); *Angelo v. Railroad Commission*, 194 Wis 543, 217 NW 570 (1928) (Statute allowing compensation to state for removal of materials from bed of navigable lake valid); *Boone v. Kingsbury*, 206 Cal 148, 273 P 797 (1928), *cert denied*, 280 US 517 (1929) (Royalty licenses to extract minerals from tidelands); *State v. Akers*, 92 Kan 169, 140 P 637, 651 (1914), *aff'd sub nom, Wear v. Kansas*, 245 US 154, 158-159 (1917) (State royalties for removal of sand and gravel) and *United States v. Mackey*, 214 F 137, 140 (D Okla 1913), *rev on other grounds*, 216 F 126 (8th Cir

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(Continued from page 15)

until the state is shown to have parted with title as by statutory grant or deed. ORS 274.025; *State v. Corvallis Sand & Gravel Co.*, 18 Or App 524, 526 P2d 469, 479-480 (1974), *aff'd* 75 Adv Sh 2068, 272 Or 545, 536 P2d 517 (1975); *State v. McVey, supra*, 168 Or at 345-348; *Bowlby v. Shively*.

1914) (State oil and gas lease); and *Coosaw Mining Co. v. South Carolina*, 144 US 550, 562, 564 (1892) (Statutory franchise to private corporation to mine phosphate rocks and phosphatic deposits in navigable waters of state construed to be for 21 years rather than in perpetuity).

In House Report No. 1778, which was included as an appendix to H. R. 5992, (83rd Congress, 1st Session 1953), which resulted in the Submerged Lands Act, it was pointed out:

> "The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law.
>
> "The evidence shows that the States have in good faith always treated these lands as their property in their soverign [sic] capacities; that the States and their grantees have invested large sums of money in such lands; that the States have received, and anticipate receiving large income from the use thereof, and from taxes thereon; that bonded indebtedness, school funds, and tax structures of several States are largely dependent upon State ownership of these lands . . . ." 2 US Congr & Adm News at 1429-1430.

United States v. California, 332 US 19 (1947) upset these assumptions when this court held that the United States rather than California was possessed of the paramount rights in and powers over the lands and minerals within the three-mile marginal belt along the California coast. Although the California case dealt with the tidal

waters over the three-mile coastal belt, the states feared that the implications of the decision would eventually result in the federal government asserting similar authority over inland waters and the underlying soils. Thus it was noted in House Report No. 1778, which accompanied H. R. 5992 as an appendix thereto:

> "State officials from every inland State in the Union ,except three, testified or submitted statements that *in their opinion the decision had clouded the long-asserted titles of the inland States to lands and natural resources below navigable waters within the boundaries of the inland States.* . . .
>
> ". . . .
>
> "The rationale of the so-called inland water rule was vigorously attacked by the Attorney General of the United States in the California case. Although he did not ask that it be overruled, he did state that 'the tidelands and inland water rule is believed to be erroneous.'
>
> *"The Supreme Court has as much power to overrule its prior decisions laying down the inland water rule as it had the power to change its belief regarding ownership of the marginal belt within the boundaries of the States; and it may well do so in view of its holding in the California case, unless Congress acts to establish the law for the future.* There was testimony expressing the view that the Federal Government now had the right to take oil, gas, oysters, and other resources from under navigable inland waters, without compensation." (footnote omitted) 2 US Code Cong & Adm News at 1425. (Emphasis supplied).

As a result of the *California* case and the concerns it raised, the Submerged Lands Act was passed, 43 USC §1301, *et seq.* 43 USC §1311 of that act declared:

> "(a) It is determined and declared to be in the public interest that (1) title to and ownership of lands beneath navigable waters within the boundaries

> of the respective States, *and the natural resources within such lands and waters*, and (2) *the right and power to* manage, administer, *lease, develop, and use the said lands and natural resources* all in accordance with applicable State law be, and they are, subject to the provisions hereof, *recognized, confirmed, established and vested in and assigned to the respective States* or the persons who were on June 5, 1950, entitled thereto under the law of the respective states in which the land is located, and the respective grantees, lessees, or successors in interest thereof; . . ." (Emphasis supplied).

This provision clearly contemplates and approves the existence of state leasing of the soils under its navigable waters. It enunciates a policy that recognizes, confirms, establishes and vests (1) title to and ownership in the state of the lands beneath the state's navigable waters whether inland or not[5] and (2) the right and power in the state to manage, develop and lease such lands and the natural resources therein.

In 43 USC §1311 (b) (1) the United States implemented the above policy by releasing and relinquishing to the states or their grantees or lessees all right, title or interest the United States might have had to such lands and natural resources. *See, Bonelli, supra*, 414 US at 324.

Based on the foregoing authorities it cannot seriously be maintained that the state does not have full and complete authority to control or lease the beds of its navigable rivers for whatever apppropriate purposes the state

[5] 43 USC §1301(a) defines lands beneath navigable waters as including both tidal and non-tidal waters within a state.

chooses subject only to the overriding powers of Congress to control navigation and commerce.

By virtue of Article VIII, Section 5(2) of the Oregon Constitution, which directs the State Land Board to "manage the lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management" and its companion provision in ORS 273.031 the State Land Board views Oregon's navigable waterways as a publicly-owned, multiple-use resource which must support public needs for recreation and scenic open space, transportation, commercial and recreational fishing, commercial utilization such as storage or parking space for log rafts, residential needs such as for house boats, water-dependent facilities such as large commercial wharves, marinas and the like. Much valuable commerce also depends upon the use of the beds of such waterways for the extraction of valuable sands and gravels, oils, gas, sulphur and other materials contained therein.

Oregon's concept of managing its navigable waterways both as expressed in its legislation and in the rules of the State Land Board acting under Article VIII, Section 5(2), of the Oregon Constitution, is that they are not only publicly-owned resources of great value but also resources that have finite limits as to their availability and utility. Accordingly no private person should have

a right to occupy a portion of a navigable waterway and its underlying submerged and submersible lands for commercial use to the exclusion of the general public without the consent of the State Land Board or the Division of State Lands manifested by a lease.[6]

This general policy is manifested in state statutes controlling the extraction of sand, gravel and other materials from state-owned lands under navigable waters. ORS 273.225, 273.231, 274.530, 274.560; the extraction of hard minerals from such lands (ORS 274.615); the extraction of oil, gas and sulphur (ORS 274.710); and the harvesting of kelp and sea weed (ORS 274.885).

In addition, by general statutes the legislature has authorized the Division of State Lands to sell or lease for appropriate purposes its submerged[7] and submersible[8]

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[6] The State of Oregon makes no charge for the use of its navigable waterways as a highway or for transitory anchorage purposes or for transitory moorage incident to the loading or unloading of cargo or the movement thereof. This is because Oregon's admission act requires that "said rivers and waters, and all navigable waters of said state shall be common highways and forever free, as well as to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor." 11 Stat 383. The purpose of this provision is to prevent the states from imposing a toll or tax for the public's use of the navigable waters as a highway. *See Willamette Iron Bridge Co. v. Hatch*, 125 US 1, 12 (1888); *Cardwell v. Bridge Company*, 113 US 205, 212 (1885).

[7] ORS 274.005(7) defines submerged lands as "lands lying below the line of ordinary low water of all navigable waters within the boundaries of this state as heretofore or hereafter established, whether such waters are tidal or nontidal."

[8] ORS 274.005(8) defines submersible lands as "lands lying between the line of ordinary high water and the line of ordinary low water of all navigable waters and all islands, shore lands or other such lands held by or granted to this state by virtue of her sovereignty, wherever applicable, within the boundaries of this state as heretofore or hereafter established, whether such waters or lands are tidal or nontidal."

lands. ORS 274.040(1), 274.915. The State Land Board has adopted regulations implementing the general leasing authority of the two statutes just cited. Chapter 141, Oregon Administrative Rules. Section 82-010 of those regulations provide:

"(1) The purpose of these rules is to establish procedures for leasing state-owned submerged and submersible lands.

"(2) Uses of state-owned submerged and submersible lands which require leases include, but are not limited to:

"(a) Aquaculture projects involving the cultivation of acquatic plants and animals for domestic or commercial purposes.

"(b) Industrial and/or commercial business areas.

"(c) Houseboats and houseboat moorages.

"(d) Commercial and workboat moorages.

"(e) Class I marinas.

"(f) Class I private docks, floats, and boathouses.

"(g) Log storage or booming areas including millside log boom areas (both makeup and breakdown areas).

"(h) Other uses not exempted by law.

"(3) Uses which do not require leases include, but are not limited to:

"(a) Vessels engaged in navigation or navigational aids.

"(b) Temporary log tieups.

"(c) Class II marinas.

"(d) Class II private docks, floats, and boathouses.

"(e) Material removal leases under ORS 274.550 and 274.530.

"(f) Public boatramps—providing that only a nominal fee to cover maintenance of the facility is charged for use by the public.

"(g) Uses exempted by law.

Section 82-015 provides in part:

> (1) Any person engaged in a permanent or long-term use of state-owned submerged or submersible lands not exempted from leasing by statute or these regulations must obtain a lease from the Division. Each application for lease shall be on forms suppplied by the Division and shall contain the following information: . . ."

The State Land Board fixes rental rates for all the various leases. Income from the leases is either placed in the Distributable Income Account in the Common School Fund for ultimate distribution to the common schools of the state or placed in the permanent portion (corpus) of the Common School Fund, the investment earnings of which are distributed for the support of the common schools. ORS 273.105; 293.701, 293.721, 293.726, 293.751(2), 327.405, 327.420, 327.425. Leases involving navigable waterways, therefore, not only serve to make a reasonable and fair allocation of a limited resource among competing needs, but also in doing so benefit the public welfare.

We point out all the foregoing to illustrate that viewing a navigable waterway today as simply a highway of commerce for which purpose the state has a limited sovereign interest in the bed thereof in order to guarantee the freedom of commerce over the surface is far too narrow a view to be either realistic or fair to the public, let alone be consistent with this Court's prior pronounce-

ments on the subject commencing with *Martin v. Waddell, supra.*

It does not appear that this Court intended to do so in *Bonelli* except to point out that the state's interest in the bed was limited in the sense that if the waters left the bed, the state's interest in the bed as a general rule would terminate because ordinarily the public would no longer have a need for ownership of the dry, abandoned bed.

If this is what the court intended to hold in *Bonelli,* the State has no quarrel with the holding or its underlying rationale *if* this court will be consistent in the application of that rationale and hold in this case that the title of the State follows the waterway in its various movements since statehood.

The statement of the rule in this manner would flow from a recognition of the fact that a navigable waterway and its underlying soils are a multiple use resource with many values both tangible and intangible which are of great importance to the state and its people. If navigable waterways are viewed in this context, it is anomalous, to say the least, to adhere to a rule that would qualify the full ownership and control of such resource—both its waters and underlying soils—upon a historical evaluation of 117 years of complex river history to determine whether an "avulsion" occurred. (Case No.

75-567).[9] But in the same context, along with dozens of United States Supreme Court cases to the contrary, commencing with *Martin v. Waddell, supra,* to conclude that the state has no proprietary interest in its navigable soils and, therefore, it cannot lease a portion thereof for the benefit of the public good and in accordance with the navigational servitude would be the grossest kind of shock.

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[9] If this court feels that constitutionally there must be an avulsion exception to this rule, then the court to preserve its *Bonelli* rationale should hold that the circumstances for finding such an avulsion are limited and rare. (State's brief on merits, pp. 25-27).

CONCLUSION

For the reasons advanced in Case No. 75-567 and in this case, No. 75-577, the collective judgments of the Oregon Supreme Court and the Court of Appeals should be reversed with respect to Fischer Cut and those courts directed to award Fischer Cut (parcels 2A, 2B and 2C and a portion of parcel 3) to the state; the judgment for damages as modified by the Court of Appeals should be affirmed with directions to that court to remand the case to the trial court to find the state's damages for the reasonable value of the use by defendant at Fisher Cut.

Respectfully submitted,

LEE JOHNSON
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March, 1976

APPENDIX

APPENDIX

The Submerged Lands Act, 43 USC §1311 provides, in pertinent part:

"(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

"(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on the effective date of this Act, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided

by stipulation or agreement between the United States and any of said States;

"(c) The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: *Provided, however,* That, if oil or gas was not being produced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from the effective date hereof equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued, such lease: *Provided, however,* That within ninety days from the effective date hereof (i) the lessee shall pay to the State or its grantee issuing such lease all rents, royalties, and other sums payable between June 5, 1950, and the effective date hereof, under such lease and the laws of the State issuing or whose grantee issued such lease, except such rents, royalties, and other sums as have been paid to the State, its grantee, the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States and not refunded to the lessee; and (ii) the lessee shall file with the Secretary of the Interior or the Secretary of the Navy and with the State issuing or whose grantee issued such lease, instruments consenting to the pay-

ment by the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States to the State or its grantee issuing the lease, of all rents, royalties, and other payments under the control of the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States or the United States which have been paid, under the lease except such rentals, royalties, and other payments as have also been paid by the lessee to the State or its grantee; . . ."

Or Const, art VIII, §5(2) provides:

"(2) The board shall manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management."

ORS 105.005 provides:

"Any person who has a legal estate in real property and a present right to the possession thereof, may recover possession of the property, with damages for withholding possession, by an action at law. The action shall be commenced against the person in the actual possession of the property at the time, or if the property is not in the actual possession of anyone, then against the person acting as the owner thereof."

ORS 105.010 provides:

"The plaintiff in his complaint shall set forth:

"(1) The nature of his estate in the property, whether it be in fee, for life, or for a term of years; including, when necessary, for whose life and the duration of the term.

"(2) That he is entitled to the possession thereof.

"(3) That the defendant wrongfully withholds the property from him to his damage for such sum as is therein claimed.

"(4) A description of the property with such

certainty as to enable the possession thereof to be delivered if there is recovery."

ORS 105.025 provides, in pertinent part:

"The jury by their verdict shall find as follows:

"(1) If the verdict is for the plaintiff, that he is entitled to the possession of all or a part of the property described in the complaint, or that he owns an undivided share or interest in all or a part of the property; including the nature and duration of his estate in such property."

ORS 105.030 provides:

"The plaintiff shall only be entitled to recover damages for withholding the property for the term of six years next preceding the commencement of the action, and for any period that may elapse from the commencement to the time of giving a verdict, excluding the value of the use of permanent improvements made by the defendant. When permanent improvements have been made upon the property by the defendant, or those under whom he claims, while holding under color of title in good faith and adverse to the claim of the plaintiff, the value of the improvements at the time of trial shall be allowed as a setoff against such damages."

ORS 273.031 (1974 Replacement Part) provides:

"The Governor, Secretary of State and State Treasurer constitute the State Land Board. The board shall carry out the duties prescribed by section 5, Article VIII of the Oregon Constitution, and such other duties as are imposed upon it by law. The board may use a common seal."

ORS 273.041 (1974 Replacement Part) provides:

"The Division of State Lands is created, and consists of the Director of the Division of State Lands and all officers and employes of the division acting under the State Land Board. Subject to ORS 273.-171, the division shall exercise all of the administrative functions exercised by the Clerk and other per-

sonnel of the State Land Board before January 1, 1968."

ORS 273.225 (1974 Replacement Part) provides:

"Before any person shall take any material from any real property of the State of Oregon, except in the manner and for the purposes mentioned in ORS 274.525 or 274.550, he shall apply to the division for a lease. The application shall include a complete description of the location of the contemplated operation, the time and manner of contemplated removal, and such other pertinent information as the division may require. Upon receipt of such application the division may award a lease to the applicant and fix a royalty in the same manner provided in ORS 274.530."

ORS 273.231 (1974 Replacement Part) provides:

"(1) No person shall remove material from any real property of the State of Oregon for commercial uses without complying with ORS 273.225, 274.550 and 274.560.

"(2) The establishment or placing of a dredging or digging outfit on any waters, the submersible or submerged lands of which belong to the State of Oregon, and the removal of material from the submersible or submerged lands thereof for commercial uses, without having applied for and received a lease under ORS 274.530, is a continuing trespass."

ORS 273.235 (1974 Replacement Part) provides:

"The division may inspect and audit books, records and accounts of each person removing material from any real property of the State of Oregon, and make other investigation and secure or receive other evidence necessary to determine whether or not the division is being paid the full amount payable to it or the removal of such material. The division may proceed by action or suit to enforce payment for all materials taken from any real property of the State of Oregon, for commercial uses, whether under

lease, or otherwise, for which payment has not been made."

ORS 274.025(1) (1973 Replacement Part) provides:

"The title to the submersible and submerged lands of all navigable streams and lakes in this state now existing or which may have been in existence in 1859 when the state was admitted to the Union, or at any time since admission, and which has not become vested in any person, is vested in the State of Oregon. The State of Oregon is the owner of the submersible and submerged lands of such streams and lakes, and may use and dispose of the same as provided by law."

ORS 274.040(1) (1973 Replacement Part) provides:

"Except as provided in subsection (2) of this section, submersible lands owned by the State of Oregon may be sold or leased only to the highest bidder after being advertised not less than once each week for four successive weeks in two or more newspapers of general circulation in the state, one of which must be of general circulation in the county in which the lands are situated. However:

(a) No such lands shall be sold for less than $5 per acre.

(b) Any owner of lands abutting or fronting on such submersible lands shall have the preference right to lease or purchase at the highest price offered in good faith. This preference does not apply as to any lease offered or issued by the division under ORS 274.615 or 274.705 to 274.860."

ORS 274.530(1) (1973 Replacement Part) provides:

"The division may, after notice of competitive bidding, and following such competitive bidding, lease submersible and submerged lands of navigable streams, owned by the State of Oregon, for the purpose of removing material therefrom. Competitive bid requirements may be waived for leases of less than one year's duration. No lease shall be made for a lump sum but only on a basis of the price per cubic yard or ton for the material removed."

ORS 274.560 (1973 Replacement Part) provides:

"The division may enter into contract of lease for purposes of ORS 274.525 to 274.590 with such stipulations protecting the interest of the state as the division may require, and shall require a bond with a surety company authorized to transact a surety business in this state, as surety, to be given by the lessee for performance of such stipulations, and providing for forfeiture for nonpayment or failure to operate under the contract. No contract shall be entered into giving any person an option of leasing or purchasing the property of the State of Oregon. The lessee in all such contracts shall report monthly to the division the amount of material taken under the contract and pay to the division the amount of royalty thereon provided in the contract."

ORS 274.915 (1973 Replacement Part) provides:

"Except as otherwise provided in ORS 274.905 to 274.940, the division may sell, lease or trade submersible or submerged lands owned by the state and new lands created upon submersible or submerged lands owned by the state in the same manner as provided for submersible lands in ORS 273.006 to 273.435, 273.505 to 273.551, 273.605 to 273.761, 273.805 to 273.990, 274.005 to 274.025, 274.040 to 274.925, 274.935, 274.940 and 274.990."

In the Supreme Court of the United States

October Term 1975

No. 57-577

CORVALLIS SAND AND GRAVEL COMPANY,
an Oregon corporation,

Petitioner,

v.

STATE OF OREGON ex rel State Land Board,

Respondent.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

SUPPLEMENTARY FACTS

All the property in dispute was originally patented out from the federal government. (App. 1, Exs. 120, 184, 185) Title relates back to the time of entry. 1/

1/ "In an action at law for the recovery of the possession of real property, if either party claims the property as a donee of the United States under the Act of Congress approved September 27, 1850, commonly

The Willamette River above Corvallis, where the disputed property is located, is not considered navigable in its ordinary condition by the federal government. (App. 2)

SUMMARY OF ARGUMENT

I

Definition of Navigability.

- - - - -

Determining "navigability" is a matter for the federal courts.

The original definition that "navigability" refers to rivers and bodies of water suitable, in their ordinary condition, for commerce, trade and travel has been liberalized by the states to include those bodies of water used for small craft with the result the states claim ownership of streams not navigable under federal law. A re-affirmation is needed that "navigability" refers to waters suitable for commerce, trade or travel.

The title to the beds of navigable waters, being determinable, passes from the state to the riparians when the waters cease to be navigable.

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called the Donation Law by the Acts amendatory thereto, such party from the date of his settlement on the property, as provided in said Acts, is deemed to have a legal estate in fee in the property ..." Oregon Revised Statutes 105.070

The disputed portion of the Willamette River is not "navigable" in the opinion of the Corps or under the definition requiring that the waters be suitable for commerce, trade and travel. It is properly designated a "floatable" stream the proprietary ownership of the bed being vested in the riparians.

II

Submerged Lands Act.

- - - - -

The Submerged Lands Act, which is a quit claim from the federal government to the states, did not convey any new interest in the beds of navigable fresh water streams to the states nor did it enhance the states' rights in navigable fresh water streams because the federal government had no property to transfer.

III

Extent of States' Interest
a Matter of Federal Law.

- - - - -

The determination of the extent of the interest of the states in the beds of navigable fresh water streams is a matter to be determined by the federal courts.

IV

Equal Footing Doctrine Not Relevant

- - - - -

The states did not receive title to the beds of navigable fresh water streams under the equal footing doctrine. This doctrine relates primarily to political and sovereign matters and not to property rights. Under the doctrine newly admitted states are to be treated equally with, but not superior to, the original 13 states. None of the original 13 states held title to the beds of navigable fresh water streams, that title being vested, under common law principles, in the riparians. The non-applicability of the equal footing doctrine is evidenced by the absence of any discussion of the doctrine in such scholarly works as CJS, Farnham, Gould, and Waters and Water Rights published by The Allen Smith Company.

V

Violation of Due Process.

- - - - -

The first case to indicate that the common law principle of proprietary ownership of the beds of navigable fresh water streams by the riparian was to be modified was Barney v. Keokuk decided by the court in 1876. By that time 38 states had been admitted to the Union and large areas of the land comprising the states yet to be admitted had been settled. These states and prospective states (except Louisiana) followed the common law which vested proprietary ownership of the beds of navigable fresh water streams in the riparians. On achieving statehood all continued the common law in force (except Louisiana). Washington (admitted in 1889), while it adopted the common law, included in its constitution a provision reserving ownership of the beds of navigable fresh water streams

to the states. (This constitutional provision would operate prospectively.) Riparian proprietary ownership could not be retroactively divested by court decision, by statute or by constitutional amendment.

The proposition that it is a violation of due process to retroactively divest the riparian of his proprietary interest in the beds of navigable fresh water streams is not contrary to the decisions of this Court holding that it is for the states to decide what disposition is to be made of the beds of those streams, the states having elected, by adoption of the common law, to award that ownership to the riparians.

VI

Riparian Owns Sand and Gravel.

The sand, gravel and other materials constituting the beds of navigable fresh water streams, are owned by the riparian. This follows from the common law and is based on the fact the removal of sand and gravel and other materials requires a permit from the Corps and does not interfere with navigation. Ownership in the riparian also flows from the fact that the state's interest in the bed is "as a bed" and not in the individual grains of sand, gravel, mud and rocks. In the context of the common law this is expressed as the jus privatum, or proprietary interest of the riparian, as distinguished from the jus publicum, or public interest, which is the property and responsibility of the state.

VII

Public Policy.

The quality of being riparian, especially to navigable waters, may be a land's most valuable feature. It is important and should be protected. The sole source of protection is through the federal courts which should require the states to honor the common law which they adopted.

BRIEF

PROPOSITION I

THE SUBMERGED LANDS ACT DID NOT PASS TITLE TO THE BEDS OF NAVIGABLE FRESH WATER STREAMS TO THE STATES.

ARGUMENT

The Submerged Lands Act (43 USC Sec. 1301(a)(1) did not enlarge the state's ownership of the beds of navigable fresh water streams. Bonelli Cattle Company et al v. Arizona, 414 U.S. 313, 324, 94 S.Ct. 517, 38 L.Ed.2d 526. The act was a quit claim of both tidal and fresh water properties. Its passage was motivated by the decision of the court in United States v. California, 332 U.S. 19, 67 S.Ct. 1568, 91 L.Ed. 1889 (1957) which gave the federal government a "paramount interest" in marginal sea lands. Bonelli, U.S. at 324. The statute is irrelevant to inland waterways. Bonelli, U.S. at 324. The irrelevancy grows from the fact the federal government had no interest in the beds of navigable[2/] fresh water streams which it could quit-claim except where it was the riparian owner.

[2/] The definition of "navigability" is fundamental

PROPOSITION II

THE EXTENT OF THE STATES' INTEREST IN THE BEDS

to a determination of the ownership of the beds of navigable fresh water streams. "Navigability" is to be defined by federal law. Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 87 (1922). Waters are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The Daniel Ball v. United States, 77 U.S. 999, 1001 (1870); 78 AmJur2d 503, Waters, Sec. 61. "The mere capacity to permit passage in a boat of any size, however small, from one stream or rivulet to another is not sufficient to constitute the former a navigable water of the United States unless the channel is substantially useful for some purpose of interstate commerce." 1 Farnham, Water and Water Rights, 67, Sec. 15, citing Leovy v. United States, 177 U.S. 621, 44 L.Ed. 914, 26 S.Ct. Rptr. 797; United States v. Oregon, 297 U.S. 1, 23 (1934); 1 Farnham 100, Sec. 23; 78 AmJur2d 505, Waers, Sec. 62. (The implication of Bonelli, supra, U.S. at 326, is that when water ceases to be navigable the state's title, being determinable, is divested. Under common law concepts this divestment would follow because there is no longer any jus publicum which requires protection by the state. See also United States v. 1629.6 Acres of Land, (1971) (D.C. Del.) 335 Fed. Supp. 255, Supp. opinion (D.C. Del.) 360 Fed. Supp. 147, affirmed in part and reversed on other grounds (C.A. 3 Del.) 503 Fed.2d 764.)

OF NAVIGABLE FRESH WATER STREAMS IS TO BE DETERMINED

"Navigable" streams should be distinguished from streams which are merely "floatable" as by logs or small craft, the state having no proprietary interest in the beds of floatable streams. 1 Farnham 121, Sec. 25; 78 AmJur2d 820, Waters, Sec. 382.

Courts take judicial notice of navigability or non-navigability. 31 CJS 939-40, Evidence, Sec. 33(1).

The Willamette River in Oregon above Corvallis is not navigable. (App. 2) [On trial Corvallis Sand and Gravel Company acknowledged this portion of the Willamette River to be navigable. This was on the basis of state law.]

[Thompson on Real Property, Vol. 6, 1962 Replacement, Sec. 3074 at page 704 states, "By the common law, even such rivers as the Mississippi, the Missouri, the Ohio, the Hudson, and the Connecticut and other great rivers, above the point where the tide ebbs and flows, would not be navigable rivers, though they are navigable in fact; and therefore, where such a river forms a boundary of land the grantee becomes a riparian owner, and his grant extends to the center of the river." Citing Jones v. Soulard, 24 How. 41 (1860); St. Louis v. Rutz, 138 U.S. 243, 34 L.Ed. 948, 11 S.Ct.Rptr. 337; Hardin v. Jordan, 140 U.S. 371, 35 L.Ed. 428, 11 S.Ct. 808 and numerous state cases.]

The states should not be permitted to extend their claims of ownership to the beds by equating

UNDER FEDERAL COMMON LAW.

ARGUMENT

Ownership of the beds of navigable fresh water streams is to be determined on the basis of federal common law. Bonelli, supra, U.S. at 324 and 325 (latter is dissenting opinion of Mr. Justice Stewart).

Being riparian, especially to navigable water, is a valuable asset of ownership which requires protection under federal common law. Bonelli, supra, U.S. at 326.

PROPOSITION III

THE STATES DID NOT ACQUIRE ANY PROPRIETARY INTEREST IN NAVIGABLE FRESH WATER STREAMS BY VIRTUE OF THE EQUAL FOOTING DOCTRINE.

ARGUMENT

"Equal footing" was a doctrine developed to protect the states in their political and sovereign rights. United States v. Texas, 339 U.S. 707, 70 S.Ct. 918, 94 L.Ed. 1221, 1226-27 (1950); Case v. Toftus, 39 Fed. 730 (1889)[3/]; 81 CJS 923, States,

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"navigable" with "floatable" in order to support a claim of proprietary ownership. 78 AmJur2d 506, Waters, Sec. 62. The requirement that the water be suitable for commerce, trade and travel, on a substantial basis, should be reaffirmed.

3/"The doctrine that new states must be admitted

Sec. 22(2); and Hanna, "Equal Footing in the Admission of States", III Baylor L.Rev. 519, 530 (1951)

The equal footing doctrine was first adopted in the Northwest Ordinance (1784) and was reenacted in

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into the Union on an 'equal footing' with the old ones does not rest on any express provision of the constitution, which simply declares (article 4, sec. 3) 'new states may be admitted by congress into this Union,' but on what is considered and has been held by the supreme court to be the general character and purpose of the union of the states, as established by the constitution,---a union of political equals. Pollard v. Hagan, 3 How. 233; Permoli v. New Orleans, Id. 609; Strader v. Graham, 10 How. 92.

"But certainly this equality does not require that the new state shall be admitted to any right in the soil thereof considered as property. The anti-Revolution states acquired no property in the soil thereof by entering into the Union. The lands that had not passed into private hands they already owned and held, as the political successors of the British crown.

"The true constitutional equality between the states only extends to the right of each, under the constitution, to have and enjoy the same measure of local or self government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national government."

[Judge Deady's opinion contains interesting observations on what the courts have done in the name of equal footing.]

1789 at the time of the adoption of the constitution. The doctrine grew out of the controversy between previously admitted and newly admitted states over the extent of land holdings of existing states outside of their boundaries. Hanna, III Baylor L.Rev., supra, at page 523. Equal footing was not relevant to the proprietary ownership of the beds of navigable fresh water streams. The law was settled that the beds of navigable fresh water streams belonged to the riparian. Vol. 1, Water and Water Rights, The Allen Smith Co., 1967, pp 267-268, Sec. 42.2 (hereinafter cited as Smith); Thompson on Real Property, Vol. 6, 1962 Replacement, Sec. 3074 at p. 704.[4/] Until the court's decision in Barney v. Keokuk in 1876, infra, p 14 the states had no proprietary interest (jus privatum) in the beds of fresh water streams but did have the duty to protect the public right of navigation (jus publicum). The jus publicum, as an aspect of sovereignty, constituted a form of limited ownership and was a trust obligation for the protection of the public at large. With the passage of time the purpose and scope of the equal footing doctrine became obscured, as did the distinction between the concepts of jus publicum and jus privatum, and resulted in

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[4/] The brief of Utah-New Mexico as Amici Curiae acknowledges that, "...the 13 Original States viewed tide waters as navigable (subject to public use) and waters above the ebb and flow of the tide as non-navigable (privately owned) because this had been the law of England, as explained in Section III of this brief. Riparian rights were more extensive in non-navigable waters, but they applied to a lesser extent in navigable waters." Page 69.

claims by subsequently admitted states that the equal footing doctrine granted them the proprietary ownership of the beds of navigable fresh water streams even though the original states made no such claims at the time of formation of the Union. Decisions holding that the equal footing doctrine gave the states proprietary ownership of the beds of navigable fresh water streams placed newly admitted states in a position superior to that of the original states all of which adhered to the common law (with minor modifications) under which the proprietary ownership of the beds of navigable fresh water streams was in the riparians.[5/]

The decisions which grant the states proprietary ownership on the basis of equal footing are erroneous for four reasons:

1. Equal footing means that new states are not less or greater or different in dignity or power from states previously admitted. United States v. Texas, supra, U.S. at 1227.

2. The original states did not claim ownership of the beds of navigable fresh water streams.

3. Decisions holding that equal footing gives the new states proprietary ownership are based on an historical misunderstanding.

4. Failure to distinguish between the jus publicum and the jus privatum as it applies to fresh water navigable streams.

[5/] Brief of Petitioner, pp 10-12.

Bonelli, supra, U.S. at 318[6/], perpetuates the error unless "title" is limited to the jus publicum. (Bonelli cites Pollard Lessee v. Hagen, 3 How. 212, 11 L.Ed. 565 (1845); Shively v. Bowlby, 152 U.S. 1, 38 L.Ed. 331, 14 S.Ct. 548 (1893); and Weber v. Board of Harbor Commissioners, 18 Wall. 57, 65-66, 21 L.Ed. 798 (1873) all of which involved tide water. When the states became sovereign they did, under the common law, acquire both the jus publicum and the jus privatum in tide water.)

Granting unqualified ownership of the beds of navigable fresh water streams to the states admitted since the formation of the Union makes them superior to the original states, something not intended under equal footing.[7/] [8/]

PROPOSITION IV

THE RIPARIAN CANNOT BE DIVESTED OF HIS COMMON LAW PROPRIETARY OWNERSHIP OF THE BEDS OF NAVIGABLE

6/ "Title to lands beneath navigable waters pass from the federal government to new states, upon admission to the Union, under the equal footing doctrine."

7/ Infra, Proposition IV, commencing p. 13.

8/ Corpus Juris Secundum (Navigable Waters and States), Farnham, Gould and Smith apparently do not include equal footing in their texts as a basis for state ownership of navigable fresh water streams. American Jurisprudence discusses it. 72 AmJur2d 419, States, Sec. 13.

FRESH WATER STREAMS.

ARGUMENT

Barney v. City of Keokuk, 94 U.S. 324, 24 L.Ed. 224 (1876) was the first decision of the court to indicate that proprietary ownership of the beds of navigable fresh water streams was vested in the states. Smith, 257, Sec. 41.2(B). The case involved the ownership of a portion of the bed of the Mississippi River in the state of Iowa. Iowa law declared the state to be the owner of the beds of navigable fresh water streams.

After pointing out that Genesee Chief v. Fitzhugh, 12 How. 443, declared that the Great Lakes were subject to admiralty jurisdiction, and acknowledging that Martin v. Waddell, 16 Pet. 367, Pollard, supra, p 13, and Good Title v. Kibbee, 9 How. 471, all involved tide water, the court, with some hesitation, stated:

> "...but whatever may be the true rule on this vexed question [ownership of the beds of navigable fresh water streams], and whether we rightly comprehend the Iowa decisions or not, we have no doubt that the city authorities of Keokuk, representing the public, had the right to widen and improve Water Street to any extent on the riverside, by filling in below high water, and building wharves and levies for the public accommodation."

None of the authorities, such as Jones, supra, p. 8, which held that the riparian owned the bed of navigable fresh water streams, was cited.

The foregoing is something less than a positive affirmation of state ownership, yet is the cornerstone of the states' claim of proprietary ownership.

The following illustrates the divesting of riparians of their proprietary interest:

Oregon was admitted to the Union in 1859. Its newly adopted constitution continued in force all statutes of the territorial government, one of which adopted the common law.[9/]

The Constitution of Oregon did not reserve the ownership of the beds of navigable streams to the state nor did any state statute make such a reservation.[10/]

On the basis of Jones (1860), supra, p 8, which followed the established common law, the riparians in Oregon became the proprietary owners of the beds of navigable fresh water streams within its boundaries.

(Apparently only the state of Washington (admitted in 1889) attempted to reserve to itself the

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9/ Brief of Petitioner, p 12.

10/ Respondent in its brief, pp 3, 5 and 16, cites Oregon Revised Statutes, Sec. 274.025 for the proposition that the state by statute has claimed ownership of the beds of navigable fresh water streams. The citation is misleading. Until the adoption of the Laws of 1967, Chapter 421, Section 100, this statute related only to navigable waters.

ownership of the beds of navigable fresh water streams[11/], all other states except Louisiana having adopted the common law. 15A CJS 40, Common Law, Sec. 11.)

The rationale for the proposition that vested proprietary rights of the riparian are protected against retroactive decisions, legislation or constitutional amendments is as follows:

1. Property rights are "sacred". 16AmJur2d 691, Constitutional Law, Sec. 362.

2. Riparian rights are natural property rights and are not easements or appurtenances. Gould, Law of Waters, Sec. 148 (hereinafter cited as Gould); Thompson on Real Property, Vol. 1A (1967 Replacement) Sec. 264.

3. A vested right is defined as:

> "...an immediate fixed right of present or future enjoyment."

11/ In that article [Article 17 of the Constitution of Washington], the State simply asserted its ownership of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." (Separate opinion of Mr. Justice Stewart.] Hughes v. Washington, 389 U.S. 290, 19 L.Ed. 530, 535, 88 S.Ct. 438 (1967). [The constitutional provision would operate prospectively only.]

and

> "...the term is not to be restricted to any narrow or technical meaning applicable to these words in the law of real property. A right is vested when there is an ascertained person with a present right to present or future enjoyment."
>
> 16 AmJur2d 760, Constitutional Law, Sec. 421

4. Vested rights may be created by the common law. No matter how created, they are entitled to protection and should be changed only by statutory enactment. 15 AmJur2d 811, Common Law, Sec. 15; 16 AmJur2d 762, Constitutional Law, Sec. 422; Moon v. Bullock, 151 P2d 765, 771 (Idaho) (1944)12/

5. The doctrine of stare decisis is more strictly followed where property rights, especially rights in

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12/"We must recognize that it is the problem of the Legislature, and not of the court, to modify the rules of the common law. (Citing authority) The court has no more right to abrogate the common law than it has to repeal the statutory law. (Citing authority) In other words, courts may extend old principles to new conditions, and may determine new or novel questions by analogy, and may even develop and announce new principles made necessary by changes wrought by time and circumstances, but under our constitutional system of government, courts cannot legislate; and they cannot abrogate, modify, repeal or amend rules long established and recognized as parts of the law of the land."

real property, are concerned, and where rights have become vested in reliance on the precedents. 20 AmJur2d 831, Courts, Sec. 196.

6. Once vested, property rights cannot be retroactively divested by the legislature, by the courts, by the executive or by constitutional amendment. Constitution of the United States, Amendment XIV; 16 AmJur2d 767, Constitutional Law, Sec. 426; 16 AmJur2d 930, Constitutional Law, Sec. 542; 16 AmJur2d 933, Constitutional Law, Sec. 543; 16 AmJur2d 933, Constitutional Law, Sec. 544; 16 CJS 1176, Constitutional Law, Sec. 216; Hughes, supra, p 16[13/]; 93 CJS 748, Waters, Sec. 71 citing Brewer-Elliott, supra, p 7, and United States v. Champlin Refining Co., CCS Okla., 156 F.2d 769, affirmed 67 S.Ct. 1346, 331 U.S. 778, 91 L. Ed. 1818, rehearing denied 67 S.Ct. 1747, 331 U.S. 869, 91 L.Ed. 1872; Thompson on Real Property, Vol. 1A, 1964 Replacement, Sec. 274.

7. The common law is the foundation of due process. 16 AmJur2d 259, Constitutional Law, Sec. 17; 16 AmJur2d 930, Constitutional Law, Sec. 540, 16 AmJur 2d 933, Constitutional Law, Sec. 543; 16 CJS 116, Constitutional Law, Sec. 36; 16 CJS 140, Constitutional Law, Sec. 44; 16 CJS 150, Constitutional Law, Sec. 49.

8. Vested riparian rights cannot be divested. Bonelli, supra, U.S. at 331, citing Hughes, supra, p 16; Farnham, Waters and Water Rights, Sec. 29, p 136, et seq.

The brief of Utah-New Mexico acknowledges:

13/ Separate opinion of Mr. Justice Stewart.

> "Of course, States cannot change rules of property law and give them retroactive effect, so as to divest private rights validly acquired and vested under the earlier rules, ..." (P. 13)

Examples where vested property rights have been protected are:

1. A Spanish grant of tide water land in San Francisco Bay cannot be divested after acquisition of the territory by the United States. Knight v. United States Land Association, 142 U.S. 161, 12 S.Ct. 258, 35 L.Ed. 974 (1893).

2. Vested water rights cannot be interfered with by the legislature or the courts. 78 AmJur2d 719, Waters, Sec. 276, note 82; 93 CJS 697, Waters, Sec. 7, note 71 citing Dill v. Killip, 174 Or 94, 103, 147 P2d 896 (1944).

3. Where a statute authorized the lessee of school land to purchase it, repeal of the statute did not divest the lessee of his right of purchase. Pfieffer v. Ableidinger, 89 NW2d 568 (Neb.) (1958).

4. Rules of evidence cannot be changed to take away vested property rights. Lowe v. Harris, 17 SE 539 (N.C.) (1893).

5. The state cannot, by passing a statute declaring a formerly non-navigable stream navigable, divest the riparian of his ownership of the bed. Brewer-Elliott, supra, U.S. at 60.

6. Rule in Shelley's case can only be changed

by prospective legislation, not by courts. Riegel v. Lyerly, 143 SE2d 65, 265 NC 204 (1965).

7. The legislature cannot take away husband's vested rights to alienate homestead subject only to wife's dower. Gladney et al v. Syndor et al, 72 SW 654 (Mo.) (1903).

8. A state statute adopting the common law operates to transfer to all riparian proprietors within the state the title to the bed of tideless water streams. Champlin, supra, p 18; 78 AmJur2d 821, Waters, Sec. 384, note 71, citing Donelly v. United States, 228 U.S. 243, 57 L.Ed. 820, 33 S.Ct. 449.

Riparian ownership of the beds of navigable fresh water streams, once vested, cannot be divested retroactively by constitutional amendment, by statute or by court decision.

The foregoing is not inconsistent with the announced doctrine of this court:

> "...we continue to adhere to the principle that it is left to the states to determine the rights of riparian owners in the beds of navigable streams which, under federal law, belong to the state."
>
> Bonelli, supra, U.S. at 319

At the time of admission each state had the privilege of including in its constitution, or possibly in the statutes which became effective concurrently with their respective constitutions, a provision reserving the ownership of the beds of

navigable fresh water streams to the state. Instead of such a reservation by constitutional provision (which Washington alone enacted), the states adopted the common law (except Louisiana) under which the riparians became the owners of the beds. This constituted an election by the states to make the riparian the owner to the center of the stream. Having so elected, the states cannot retroactively divest the riparians of their ownership by court decision, by legislative action or by constitutional amendment.

The first attempt in Oregon to divest riparians of their common law ownership was in Hume v. Rogue River Packing, 51 Or 237, 92 Pac 1065 (1908) which was a case involving both tide and fresh water portions of the Rogue River.[14/]

In Hume the court, at 246, relied on Martin, supra, p 14, Shively, supra, p 13, and Knight, supra, p 19 (all of which were tide water cases), for the proposition that when Oregon joined the Union it became the owner of land under all navigable waters. The decision typifies those in many states where courts have sought retroactively to divest rights created under the common law through reliance on tide water cases.

The states rely heavily upon Martin v. Waddell, 16 Pet. 234 (1842) for the proposition that the state owns the beds of navigable waters. Martin involved tide waters and as such is not authority for the proposition that the states own the beds of navigable fresh

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14/Earlier cases such as Johnson v. Knott, 13 Or 308, 10 Pac 418 (1894) dealt with the lower reaches of the Willamette River near its confluence with the Columbia which is tidal water.

water streams.

Divestment of the riparian's proprietary ownership is a violation of due process no parallel for which could be found in the law.

PROPOSITION V

THE STATE DOES NOT OWN THE SAND AND GRAVEL IN THE BEDS OF NAVIGABLE FRESH WATER STREAMS.

ARGUMENT

Oregon contends that State v. Gill, 259 Ala 177, 183, 66 S2d 141, 145 (1953) (cited in Bonelli, supra, L.Ed. at 536, for the proposition that the "...state's title is to the 'river bed as a bed'"), does not deal with the ownership of the materials of the bed itself while in place nor with whether the state has a proprietary interest in the beds and therefore is not relevant to our case.

Gill was a suit to quiet title brought by the state against a riparian on Mobile Bay (tidal waters) the title to which would be in the state. The Corps had dredged a channel in Mobile Bay, removing the materials from the bed and depositing them adjacent to the bank owned by the riparian resulting in the creation of new land in the form of an artificial accretion. The Alabama court ruled that the accretion belonged to the riparian, stating that the state's ownership of the bed:

> "...is a title to the bed as a bed and not to the individual grains of sand or lumps of mud which constitute the land making up the bed."

Under the concept of jus publicum removal of the bed materials must interfere with navigation before the state's interest is violated. The state's interest in the bed "as a bed" is to enable ships to anchor, to control impediments to navigation and to control currents and establish channels. The interest is not proprietary.

(Under Oregon law gravel is part of the soil. Whittle v. Wolff, 249 Or 217, 437 P2d 114, 117 (1968).)

The thrust of Bonelli, supra, is that the states' interest in the beds of navigable streams must be related to the states' proper interest in navigation because of its sovereignty. Bonelli, supra, U.S. at 321[15/].

Here, Corvallis Sand removed sand and gravel materials from the bed of the Willamette River under permits issued by the Corps (Exs. 280-307) which would not have permitted the removal if there had been any interference with navigation. If there had been interference with navigation the State should have proceeded under its police power to protect the public interest. (As a matter of river hydraulics, when sand and gravel are removed the river normally replaces them.)

Bonelli, by citing Gill, recongizes that the

15/"Historically, the title to the beds beneath navigable waters is held by the sovereign, Barney v. Keokuk, 94 U.S. 324, 338, 24 L.Ed. 224 (1876), as a public trust for the protection of navigation and related purposes."

states have no proprietary interest in the beds of navigable fresh water streams and in particular that they have no interest in the removal of sand and gravel material unless the public interest is jeopardized. Under Oregon law sand and gravel are part of the soil. Whittle, supra, p 23.

State also relies upon Wear v. Kansas, 245 U.S. 154, 158-159 (1917). Wear was based on the Kansas law which declared the riparian's ownership ends at the bank. Siler v. Dreyer, 183 Kan 419, 327 P2d 1031 (1956). Bonelli overrules Wear by limiting the state's interest to the bed "as a bed".

(The importance of the ownership of sand and gravel grows out of the fact the State of Oregon recovered a judgment against Corvallis Sand for $75,000 as royalty for sand and gravel materials removed from the bed of the Willamette River. If the sand and gravel is not owned by the state the judgment is void.)

CONCLUSION

> "Of all the difficult questions which have arisen in the application of the law to questions involving water rights, there is none which has produced more uncertainty, caused greater conflict of opinion, or produced more diverse results than that relating to the title to the land under the waters. This difficulty and diversity of result has arisen from either failure to perceive clearly the common law principles applicable, or a hesitation to apply them for fear of the result."
>
> Farnham, Sec. 30 at p 165. Accord, 56 AmJur 864, Waters, Sec. 451

One result of the confusion has been to victimize the riparian in his claim of proprietary ownership of the beds of navigable fresh water streams. He has been denied proprietary ownership granted him by the common law by retroactive court decisions, statutes, and constitutional amendments. He has also been victimized by definitions of "navigable" which ignored the basic requirement that navigability be related to commerce, trade and travel. Such liberal definitions have extended the claims of states to ownership of the beds of rivers and lakes which in fact were not navigable under the federal test but merely floatable.

Federal courts have acquiesced to the states in their search for grounds to claim the proprietary ownership of the beds of navigable fresh water streams. The chief means of expanding state claims have been threefold:

1. By liberalizing the definition of "navigable" or "navigability" as above set forth.

2. By claiming ownership under the equal footing doctrine. This claim is historically erroneous as the original 13 states did not claim or have ownership of the beds of navigable fresh water streams with the result newly formed states claim a right which is preferential to that of the original states.

3. By claiming proprietary ownership under the guise of "sovereignty". This claim results from the mistaken concept, acquiesced in by the federal courts, that proprietary ownership, the jus privatum, and the public right, the jus publicum, are merged into a common concept of ownership flowing from sovereignty. This concept is historically and legally erroneous.

The public rights of navigation, fishery and recreational uses can be protected under the concept of jus publicum and under the police power. There is no need for the state to have a proprietary interest in order to protect the public right. The only reason, and the true but unacknowledged reason, the states seek proprietary ownership is to garner available revenues for the benefit of the public treasury. The profit motive does not justify the violation of due process.

Historically the riparian owned the sand and gravel materials in the beds of navigable fresh water streams. He was free to remove these materials so long as he did not interfere with the public right. In our country the Corps has assumed the obligation of protecting the public right by requiring a permit to remove materials from the beds of navigable fresh water streams, such permits not being issued where the public right would be interfered with. With the permit as a condition precedent to removal, the states cannot sustain their position that they must own the sand and gravel materials in order to protect the public. Again, the motivation is for profit, not for protection of the public's proper rights.

Property rights are sacred. It is an anomaly in the law that the riparian has been denied equal status with owners of other types of property. By making the riparian the unequivocal proprietary owner, ad valorem tax revenues will be generated, the riparian will protect the beds and banks because he will be concerned, he will have access to the water and, one of his chief assets, that of "riparianness" will be protected. Bonelli, supra, U.S. at 326. If the riparian is not granted his proper rights the states can fill in the

bed below high water mark, destroy riparianness and authorize structures, such as buildings, to be erected between the riparian and the water. Such a use is made likely by the desperate search of the states for additional sources of revenue.

There is a simple and sensible solution to the problems generated by two centuries of confusion: adopt the common law as the federal law. The states should be required to honor the common law which they adopted. The confusion would disappear and the public and the riparian would be protected in their proper rights.

RELIEF REQUESTED

Corvallis Sand and Gravel Company should be awarded all of the disputed property free and clear of any claim of State of Oregon. The judgment awarding damages to State of Oregon should be set aside.

Respectfully submitted,

ROBERT MIX
745 N.W. VanBuren
Corvallis, Oregon 97330
Counsel for Petitioner

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ATTORNEY GENERAL

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DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION
103 STATE OFFICE BUILDING
SALEM, OREGON 97310
TELEPHONE: (503) 378-4620

March 29, 1976

Mr. Robert Mix
745 N.W. VanBuren
Corvallis, Oregon 97330

Re: Source of Title in Corvallis Case

Dear Mr. Mix

This is to follow up my conversations with you concerning the source of title to all property in dispute in the Corvallis case.

In Oregon, the lands received by the State from the Federal Government were either school lands in sections 16 and 36 of each township, the seventy-two sections received by the State from the Federal Government for a State university, (the university grant), or the 10 sections received from the Federal Government for the Seat of Government (the capitol grant), 11 Stat 383. None of the sections involved in this case, however, as shown by Exhibit 1b in evidence, are part of sections 16 and 36 and, therefore, no school lands were received by the State in the Corvallis area. Nor, are any sections of the Capitol Grant involved.

The State, however, did receive a portion of Section 12, Township 12 South, as part of its university grant and, as to this portion, the State did convey to Green B. Smith lots 1, 2 and 5, and the North half of Lot Nos. 3 and 6 and the North half of the Northwest quarter of the Southeast quarter (copy of deed enclosed). This property is along the right bank of the river. Only lots 5 and 6 are pertinent being approximately opposite Lots 10 and 9 of Section 12.

As to the remainder of the property involved in the Corvallis case, the source of title, of course, is either federal patents

or, in the case of the existing riverbed and the abandoned riverbed, whatever title the State now has, if any, would have been by virtue of the equal footing doctrine.

Sincerely

Peter S. Herman
Senior Counsel

dc
Enclosure

51

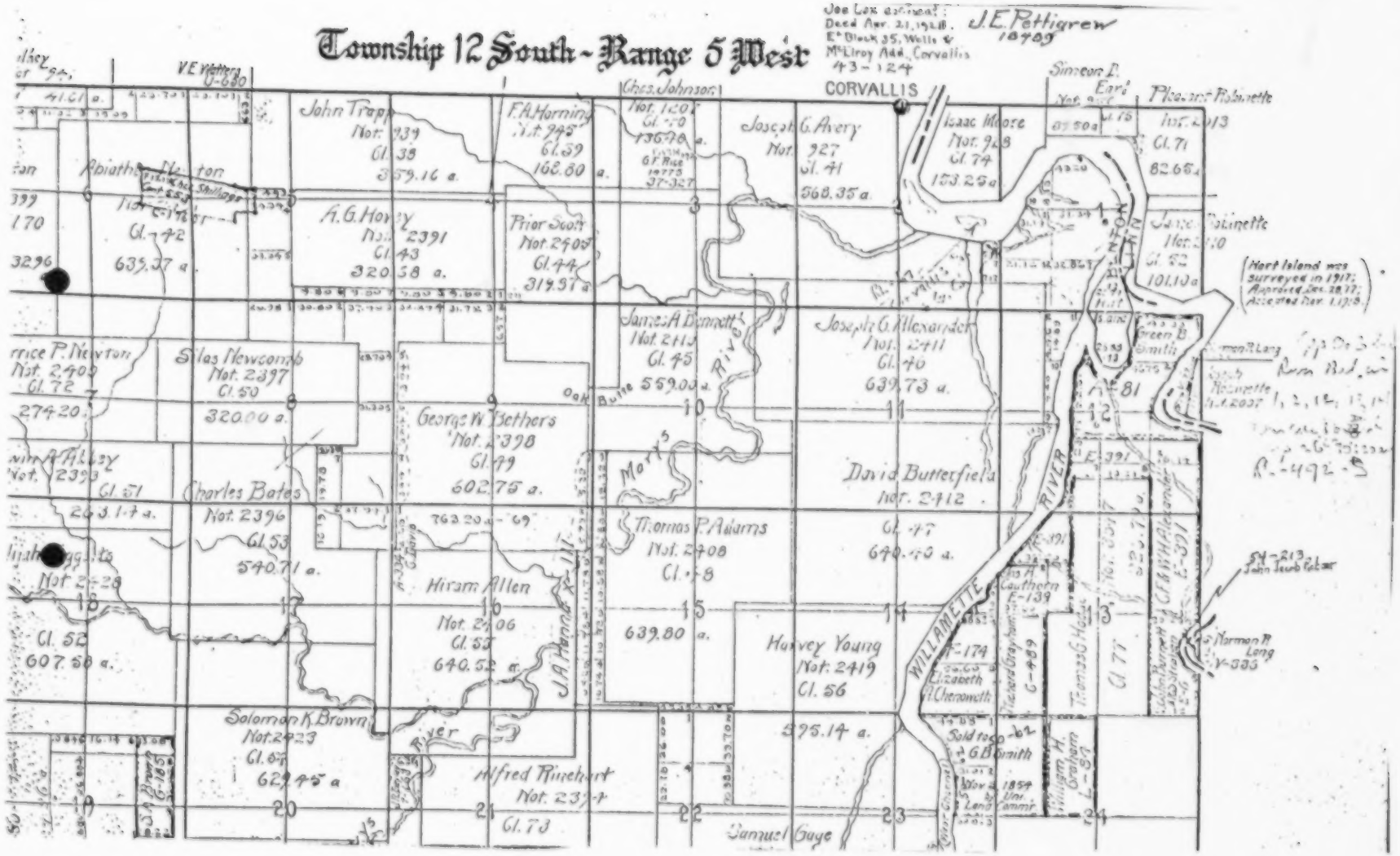
STATE OF OREGON.

In consideration of Six Hundred and Ninety Two 69/100 Dollars, paid to the Board of Commissioners for the sale of School Lands, the State of Oregon doth grant bargain, sell and convey unto Green B. Smith his Heirs and Assigns, the following described premises, to wit: Lots nos one, two and five and the north half of Lot three and the north half of the North West quarter of the Southeast quarter; all in Section 12. Township 12 South Range 5 West Willamette Meridian and containing in all one hundred and fifty three 55/100 153 55/100 acres and situate in the County of Benton and State of Oregon

To Have and to Hold, the said premises, with their appurtenances unto the said Green B Smith his Heirs and Assigns forever; and that the State will warrant and defend the same from all lawful claims whatsoever.

Witness the Seal of the State, affixed this 21st day of February 1871

L F Grover — Governor.
S. F. Chadwick — Secretary.
L Fleischner — Treasurer.



App. 5

DEPARTMENT OF THE ARMY
PORTLAND DISTRICT, CORPS OF ENGINEERS
P. O. BOX 2946
PORTLAND, OREGON 97208

REPLY TO ATTENTION OF:

NPPND-WM-2

28 May 1976

RECEIVED

Mr. Robert Mix
Attorney at Law
745 N.W. Van Buren
Corvallis, OR 97330

Dear Mr. Mix:

Your letter of 13 May requested information on maintenance of a navigation channel in the Willamette River upstream of Corvallis. Our records show that no dredging has ever been performed upstream of Corvallis.

The Flood Control Act of 28 June 1938 provides for improvement of the Willamette River including a channel 2 to 2½ feet deep from Corvallis to Eugene. In 1904 the reach between Harrisburg and Eugene was determined unworthy of improvement and no work has been accomplished. Development of a navigation channel above Corvallis is not economically feasible.

If we can be of further help to you in this matter, please feel free to call on us.

Sincerely,

A. J. HEINEMAN
Chief, Navigation Division

I hereby certify that I served the foregoing Reply Brief of Petitioner on Peter Herman, of attorneys for respondent on the day of September, 1976, by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in a sealed envelope addressed to the said attorney at Department of Justice, 103 State Office Building, Salem, Oregon 97310, which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me; said sealed envelope was then deposited in the United States post office at Corvallis, Oregon, on the day last above mentioned, with the postage thereon fully paid.

_____

Robert Mix
Attorney for Petitioner